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Gender and Reproductive Autonomy
Are there Second-Class Citizens in Europe?

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DEDICATION

This dissertation is dedicated to all those anonymous and brave women who were not granted the same opportunities to seek for happiness and fulfilment in their lives as I have been, and who may have ended up in less favourable circumstances while trying to find their places in this world. In any case, their cause and attempts were justified and highly dignified, even if the history books stay silent about them.

I also would like to express my most sincere gratitude to my highly sophisticated supervisor, Professor Teresa Pizarro Beleza, who never lost her faith in me, though there surely were times when I felt completely hopeless.

The Declaration of Sentiments, Seneca Falls Conference, 1848¹

We hold these truths to be self-evident: that all men and women are created equal: that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted, deriving their just powers from the consent of the governed. Whenever any form of government becomes destructive of these ends, it is the right of those who suffer from it to refuse allegiance to it, and to insist upon the institution of a new government, laying its foundation on such principles, and organising its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their duty to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of the women under this government, and such is now the necessity which constrains them to demand the equal station to which they are entitled. The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her.

¹ Available at the Internet Modern History Sourcebook at <http://www.fordham.edu/halsall/mod/Senecafalls.html>.
[Consulted 10 April 2008](#).

ABSTRACT

The aim of this study is to clarify the pre-conditionality of reproductive autonomy and women's citizenship in Europe in the light of the case-law of the European Court of Human Rights². Women's reproductive autonomy has often been denied in the name of the moral and ethical concerns and nationalistic discourses. However, in Europe there is a strong consensus on gender equality which covers also reproductive autonomy. The Court has tried to balance in its verdicts the competing rights of individuals and the state. It has tried to set boundaries on the question of to what extent pluralistic modern democracies must tolerate intolerance. Despite its shortcomings the Court has played an important role in securing a minimum standard of the protection though realities of the women's reproductive autonomy are still defined by the state. My approach to reproduction has been non-biological and therefore I have not made a definite distinction between biological and social parenthood. In this study, I have treated the concept of citizenship in the light of critical feminist research seeing it as a wider concept than referring only to public rights and duties but rather as forming the autonomous space in society which allows a person to lead her life as she wishes.

Keywords: women's rights, reproductive rights, gay rights, artificial fertility treatment, adoption, gender equality, European Court of Human Rights, human dignity, autonomy, sexuality, abortion, parenthood, citizenship, discrimination.

² Hereinafter referred as the ECHR or as the Court.

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INTRODUCTION

The starting point of this study is the idea that the reproductive³ autonomy of a woman is a precondition for her to take part in the affairs of society as a full citizen on an equal footing with a man. Unless women's reproductive freedom is secured within personal relationships, several human rights of significance for women will remain only wishful thinking, yet the preservation of family, culture and religion has very often been used as a rationale for the denial of full citizenship. International law has tried to balance the need to protect women's human rights against other needs which might come in conflict but this conflict remains contested.⁴ However, in Europe there is a strong consensus on gender equality⁵ which, as far as I understand it, should also cover reproductive autonomy, which from my point of view is a precondition for women's citizenship and participation in society as an active subject with full political agency.⁶

I will treat the concept of citizenship in the light of critical feminist research seeing it as a wider concept than only as a person's duties and rights in the public sphere. In my study, citizenship forms that autonomous space in society which allows a person to lead her life as she wishes. However, this autonomy is not limitless but constantly negotiated and contested by different forces prevailing in society of which the most important is a state which is seen as representing the general interests and values of the society which get their expression in the legislation.

³ "Reproductive autonomy" will be used to include one's right to adoption as well as rights associated with "biological reproduction", i.e., in my study reproduction is more a socially constructed than biologically determined function. For more information on adoptive reproduction see the article written by Kirstin E. Gager on the "independent" women in sixteenth and seventeenth-century Paris. These adoptive mothers were childless and had gained a degree of independent control over their property, which, in turn, allowed them to name an heir of their choice. Gager, 1997, pp. 5-25. In natural sciences reproduction refers to the capacity of all living systems to give rise to new systems similar to themselves. Biological reproduction may be divided to asexual and sexual reproduction. More information available at Columbia Electronic Encyclopedia at www.reference.com. (Consulted on 14 May 2008).

⁴ Eriksson, 2000, pp. 165-166. However, according to UDHR Article 29 (2) "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purposes of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". Legally this fact does not help in achieving the right balance but rather it might make the case even more complicated. *Ibidem*, 166.

⁵ By gender I mean the behavioural patterns which are supposed to dictate the way women and men live their lives. Discrimination on the grounds of "sex" is often the consequence of a sort of behaviour which is not in conformity with what is regarded as the normal gender roles. If the prohibition of discrimination implies that discrimination on the ground of sex is forbidden, then it follows that there can be no such thing as a standard behavioural pattern being attached to gender. Heinze, 1995, pp. 216-217.

⁶ Reproductive health also requires sexual health. Because reproduction is closely linked to sexuality, it is necessary to make the "sexuality connection". When one talks about procreation and fertility, one also needs to consider sexuality. Sexual health encompasses all aspects related to sexuality, and not merely reproduction. van Eerdewijk, 2001, p. 424.

The ability to control one's reproduction has direct political consequences, for example in the form of barriers to women's citizenship in terms of both status and practice. It is generally agreed that reproduction is central to women's health and well-being but there are many cases which indicate that it has become a core issue in the larger political struggles from which women themselves have been excluded.⁷ For instance, the nationalist discourse of motherhood in Poland has set women at the centre of political debate without actually prioritising their needs and desires. This has led to the situation where women no longer possess a real control over their bodies, nor their social and economic lives. The linking of motherhood with the nationalist goals in Poland has not only led to the suppressive culture towards the women's reproductive autonomy but also to a very strict abortion legislation which has produced serious conflicts of interest between the rights of individual women and the state. I will study this tension between the state and individual citizen's reproductive duties and rights in the light of the case-law of the European Court of Human Rights; having a special focus on the cases of *Evans v. The United Kingdom* (no. 6339/05) on 10 April 2007, *E.B. v. France* (no. 43546/02) on 22 January 2008, *D. v. Ireland* (no. 26499/02) on 27 June 2006, and of *Tysi c v. Poland* (no. 5410/03) on 20 March 2007. I have, as already mentioned, intentionally been unwilling to make a definite distinction between the biological and social parenthood.

Reproductive autonomy lies on the borderline between the public and private domains, pointing both towards the extent of women's capacity as individuals to exercise choice and control in relation to their bodies and towards the collective responsibility of the state for the health of its members⁸, as well as reproductive duties set over individuals by the population policies of the state⁹. This highly contested borderline provides, from my point of view, an excellent means to determine how women's role is seen in these different states; for example, what their rights and freedoms are, and what limits are imposed on their social autonomy and position in the given states. Of course, the rulings given by the European Court of Human Rights indicate in an authoritative way women's citizenship in Europe in a more general way.

⁷ Alsop and Hockey, 2001, p. 455.

⁸ Einhorn, 1993, p. 74.

⁹ For instance in Poland after the collapse of the communist regime women were coerced into subjugating individual choices to the broader political agendas of the nation, with pregnancy and motherhood regarded as duties owed to the state. Far from being seen as issues relating primarily to women's health and well-being, any proposals in support of women's greater access to reproductive services were symbolised as anti-nationalist, anti-Catholic and pro-Communist. Alsop and Hockey, 2001, pp. 458 and 461. When the nation is perceived as threatened and its existence cast into doubt, the maternal body as well as maternal-filial relationships acquire additional meanings. Motherhood ceases to be merely a metaphor, and becomes a site of discursive struggle as well as identity politics.  arkov, 2007, p. 69.

To remain child-free or to become a mother are choices which women make in terms of their own health and general well-being. These decisions are not taken in a vacuum but rather highly influenced by the society in which a woman happens to live. However, these decisions may take on wider symbolic dimensions which transform them into key political resources in times of transformation, as has been the case in Poland, or in a situation when society is trying to define its position towards technological innovations which might have unforeseeable social consequences, as can be seen in the case of *Evans v. the UK*. In Ireland, the Catholic Church has not served its role as a religious community alone but instead has been closely participating in the process of nation-building and in constructing a national identity different from “Englishness”.¹⁰ Whereas sexual minorities generally (*E.B. v. France*) have been merely tolerated in many European countries usually the protection of their family rights has been quite inadequate or even non-existent.

The decision-making power on matters related to reproduction are not pre-given or natural, but rather socially and culturally constructed and determined, which includes different power relations and even legal processes. They are a specific interpretation of social reality in which specific groups of people are allowed to make certain decisions about their sexuality and reproduction.¹¹ These interpretations define in a specific manner how women and men deal with each other in the society in a more general way as well. Whatever our choices are, we make them with reference to given cultural expectations and assumptions. We also make reproductive decisions with reference to given social and political organisations and policies.¹² Of course the ideal situation would be if social conditions would support motherhood but not require it. This would mean in practice freedom of reproductive autonomy empowering an individual to decide when and how to become a parent.

The law also defines the line between the “good” and “bad” reproducers, defining what kinds of people are worthy or unworthy of parenthood, giving or denying full citizenship rights from certain subjects, and usually this line is drawn according to the already existing hierarchies which represent certain kinds of people as unworthy in some way.¹³ The ECHR cases draw a line between those who have rights or responsibilities and those who do not.¹⁴ By analysing

¹⁰ Mullally, 2005, p. 1.

¹¹ van Eerdewijk, 2001, p. 432.

¹² Morell, 2000, p. 318.

¹³ Fletcher, 2003, p. 218.

¹⁴ *Ibidem*, p. 219.

these verdicts, I also try to ascertain whether the court has taken a progressive stand in trying to guarantee rights of an individual which would match the social reality and diversity maybe in a better manner, since laws transform social relations. Once translated into law, the complexity of relations between people and things becomes reduced to the question of who has rights over which object.¹⁵

In the first chapter, I have elaborated on the special characteristics of the Court and its jurisprudence. By studying the case-law of the Court I have tried to find out the boundaries of women's reproductive autonomy in Europe as set by the Court's jurisprudence. I have illuminated the right to have a child based on two cases processed by the Court; *Evans v. The United Kingdom*¹⁶ and *E.B. v. France*¹⁷, and the right not to have a child by analysing the cases of *D. v. Ireland*¹⁸ and *Tysi c v. Poland*¹⁹. In the second chapter I have drawn conclusions based on the case-law and the Court's jurisprudence. In the third chapter I have elaborated the concerns related to reproductive autonomy. In the fourth chapter I have used the principles of modern pluralistic democracies to defend the rights and freedoms of an individual against the authoritarian and moralistic tendencies of states and communities. I conclude the study by highlighting the pre-conditionality of reproductive autonomy to women's full citizenship and the importance of the European supranational jurisprudence in securing women's rights in Europe despite its evident shortcomings.

CHAPTER 1

CASES OF THE EUROPEAN COURT OF HUMAN RIGHTS

Before I elaborate on the case-law of the Court I will mention a few of the special features of the Court and its jurisprudence which may provide useful background information to understand the proceeding of these cases in a more profound way.

¹⁵ Fletcher, 2003, p. 221.

¹⁶ Case *Evans v. The United Kingdom* no. 6339/05, on 10 April 2007.

¹⁷ Case *E. B. v. France* no. 43546/02, on 22 January 2008.

¹⁸ Case *D. v. Ireland* no. 26499/02, on 27 June 2006.

¹⁹ Case *Tysi c v. Poland* no. 5410/03, on 20 March 2007.

First of all, it is essential to take notice of the fact that the Court does not investigate human rights violations in general but only applications which have exhausted all the domestic remedies²⁰ without reaching a friendly settlement²¹ between the applicant and the state, and in which the Court has found that “there has been a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms²² or the protocols thereto.” It suffices that the Court finds a violation of one single right, although there might have been several claims. In addition, it is not important what kind of state authority caused the violation concerned. It is also not important in what way a right was violated – be it through a decision or a measure. Violations are also interpreted extensively, i.e., they include not only positive state acts but also negative ones – omissions. The Court has even awarded compensation after it found a potential violation which subsequently did not materialise.²³

Secondly, it is important to know the fact that the Court does not have the power to declare null and void or amend acts emanating from the public bodies of the signatory states, i.e., the Court cannot annul, void or amend judicial, administrative or legislative acts, afford reparation to the victim or demand an introduction of proceedings against violators. The Court’s concept of remedies is the extrajudicial one – mechanism of just satisfaction. It is also worth noticing that the legal order created by the Convention is only binding as an international treaty²⁴, unless the

²⁰ “The Purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions... . Consequently, States are not obliged to answer for their acts before an international body before they have had an opportunity to put matters right through their own legal system... . Thus the complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic body, and in compliance with the formal requirements and time-limits laid down in domestic law... . See paragraph 77 in the case of *Selmouni v. France*, no. 25803/94, on 28 July 1999.

²¹ Friendly settlement refers to the confidential negotiations conducted by the Court with the parties in order to set right unobtrusively any breach of human rights that may have occurred. There must be an agreement between the parties disposing of the case to their satisfaction, by way of compensation or otherwise, in respect of the complaint. Secondly, the settlement must be “on the basis of respect for human rights as defined in this Convention”. It follows that such a settlement must not only be acceptable to the parties; it must also satisfy this requirement in the opinion of the Court. Only the change in the law or practice concerned would meet the general interest, both are needed, the compensating the victim and making any requisite change in the law. Jacobs and White, 1996, pp. 373-374. The requirement, for both friendly settlement and other forms of settlement, that the general interest should be satisfied is not a merely a necessary feature of a system designed to protect human rights; it also has a practical justification, since if this aspect of a settlement is neglected, there is the risk that the procedures will have to be repeated in future cases. Under Protocol No. 11, the functions of fact finding in preparation for examining the merits of claims and of securing a friendly settlement will pass to the new permanent Court. It is a reflection of the strengths of friendly settlement that no attempt has been made in the amendments to the Convention secured by Protocol No. 11 to remove this aspect of dispute settlement. *Ibidem*, p. 379.

²² Hereinafter referred as the Convention.

²³ Sharpe, 1995, p. 811.

²⁴ Cfr.: “Adherence to the Convention means that it is not possible (subject to permissible reservations) for the state’s constitutional or legal provisions to excuse its failure to implement the Convention rights and freedoms. Once, therefore, the Court has established that these have been violated, the state concerned should bring its laws and practice

contracting state chooses to incorporate it into its internal law. The Convention stipulates that states parties undertake to abide by the final judgement of the Court, meaning that decisions of the Court have binding authority and are given formal legal force, but they are not directly executory in internal law of the state party. The Court can make decisions on two questions: whether there is a violation of the Convention, and subsequently, whether it should award just satisfaction.²⁵ However, the states are obliged, by appropriate means, “to ensure that their domestic legislation is compatible with the Convention and, if need be, to make any necessary adjustments to this end”. Domestic law must be such as to “ensure the effective implementation” of all the provisions of the Convention.²⁶

Thirdly, the Court has said that interpretation of articles of the Convention “must be in harmony with the logic of the Convention” and the interpretation of the Convention must be “dynamic” in the sense that it must be interpreted in the light of developments in social and political attitudes. Its effects cannot be confined to the conceptions of the period when it was drafted or entered into force. The Convention is a living instrument and the Court has adopted a dynamic interpretation to the substance of its provisions.²⁷ However, it is widely seen that a cautious and conservative approach should be adopted to the interpretation of the Convention, since extensive interpretation could impose on Contracting States obligations they have not intended to assume in ratifying the Convention. Therefore doubts should be resolved in favour of the state rather than the individual. The resolution of doubts in favour of states has found its clearest exposition in the concept of the “margin of appreciation” which has been used extensively by the Court. The margin of appreciation is the outer limit of schemes of protection, which are acceptable under the Convention. The Court will not interfere with actions which are within the margin of appreciation. As the concept has evolved in the case-law of the Court, it has become clear that the scope of the margin will vary according to the circumstances, subject matter, and background to the issue before the Court as well as the presence or absence of common ground among the States Parties to the Convention.²⁸

into conformity with the Convention and in doing so it will be supervised by the Committee of Ministers”. McBride, 1991, pp. 164-165.

²⁵ See Zidar, 2001, pp. 371-373.

²⁶ Jacobs and White, 1996, pp. 16-17.

²⁷ *Ibidem*, 1996, pp. 30-33.

²⁸ Jacobs and White, 1996, pp. 33-37.

Fourthly, international judgements are not executed automatically. They must be accepted by the state concerned.²⁹ The Convention contains no other provisions for sanctions against a state which fails to comply with a judgment of the Court but the supervision conducted by the Committee of Ministers. Initially the Committee of Ministers took an unnecessarily restrictive view of their powers under Article 32(2), concluding that these were limited to non-binding advice and recommendation.³⁰ Therefore, arrangements had to be made to ensure that judgements rendered by the Court do not remain dead letter.

Lastly, the Convention does not explicitly include the rights to have or not to have a child *per se* but the applications related to these rights are usually articulated to be located within the prohibition of torture (Article 3), the right to respect for private and family life (Article 8), the right to found a family (Article 12), the right to an effective remedy (Article 13)³¹, and the prohibition of discrimination (Article 14) which cannot in fact be considered in isolation - there may be a violation of Article 14, considered together with another Article of the Convention.³² The additional Protocol 12 on antidiscrimination which entered into force 1 April 2005 provides wider protection against discrimination but it has been ratified only by 17 member states.³³

I will discuss the right to have a child based mainly on two cases processed by the Court, *Evans v. The United Kingdom* and *E. B. v. France*. I also touch upon other cases relevance to my study but I will not analyse them in the same depth as these two. I will treat the right not to have a child in the same manner by analysing the cases of *D. v. Ireland* and *Tysiąc v. Poland*. By combining these two different approaches I will try to find the boundaries of women's reproductive autonomy in Europe set by the Court's jurisprudence. The reason why I have selected these specific cases is found in their relation to women's inherent capacity or incapacity to become pregnant,

²⁹ Tomuschat, 2003, pp. 208-209.

³⁰ The Committee of Ministers is the executive body of the Council of Europe consisting of the foreign ministers of the member states who meet twice a year in Strasbourg. Jacobs and White, 1996, pp. 393 and 396-397.

³¹ "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in official capacity."

³² Jacobs and White, 1996, pp. 285-286. Generally speaking, ECHR Art. 14(1) rights against discrimination are recognised only with respect to other, substantive rights enumerated in the Convention. Moreover, if a case can be resolved on the basis of other rights claims, the Court may reject, or decline to address, the discrimination claim. This linkage requirement stipulates only discrimination with respect to another Convention right. It does not require that there has been a violation of that other right. In the *Abdulaziz, Cabales and Balkandali v. the United Kingdom* case, the Court found no violation of the complainant's right to privacy, but did find that they had suffered discrimination in the enjoyment of that right. Another aspect of the linkage principle is that a State may not have to undertake a given measure in order to give effect to a Convention right; however, once it does take that measure, it must apply it without discrimination. Thus, a State discriminatorily providing a right, privilege, or service not required by the Convention may be in violation, whereas a State not providing it at all may not be in violation. Heinze, 1995, pp. 224-225.

³³ Council of Europe's Treaty Office at www.conventions.coe.int. (Consulted 11 July 2008).

except the case of *E. B. v. France*. This case is about the adoption process by a lesbian woman, which, in its turn is an interesting case of the Court indicating the values and attitudes towards the concept of family in Europe. The legal system is greatly challenged when facing these types of “unequal” characteristics like pregnancy; and it is interesting to find out how the Court tries to make comparisons of “similarly situated” men and women in such situations.³⁴

1.1. RIGHT TO HAVE A CHILD

As I mentioned earlier the Convention does not expressly include a right to have a child *per se* but the cases related to this right are constructed through other rights and freedoms of the Convention.

1.1.1. The Case of *Evans v. the United Kingdom*

First of all, I will present the principal facts in the case of *Evans v. the United Kingdom*. The applicant is a 35-year-old British national who on 12 July 2000 together with her partner J, born in November 1976, started fertility treatment at the Bath Assisted Conception Clinic. On 10 October 2000, during an appointment at the clinic, Ms. Evans was diagnosed with a pre-cancerous condition of her ovaries and was offered one cycle of in vitro fertilisation (IVF) treatment prior to the surgical removal of her ovaries. During the consultations held that day with medical staff, Ms. Evans and J were informed that they would each need to sign a form consenting to the treatment and that, in accordance with the provisions of the Human Fertilisation and Embryology Act 1990 (“the 1990 Act”), it would be possible for either of them to withdraw his or her consent at any time before the embryos were implanted in the applicant’s uterus.

Ms. Evans considered whether she should explore other means of having her remaining eggs fertilised, to guard against the possibility of her relationship with J ending. However, J reassured her that it would not happen. On 12 November 2001 the couple attended the clinic for treatment resulting in the creation of six embryos which were placed in storage and, on 26 November 2001, Ms. Evans underwent an operation to remove her ovaries. She was told she would need to wait for two years before the implantation of the embryos in her uterus. In May 2002 the relationship between the applicant and J ended and subsequently, in accordance with the 1990 Act,

³⁴ See Krieger and Cooney, 1993, p. 163.

he informed the clinic that he did not consent to Ms. Evans using the embryos alone or their continued storage.

The applicant brought proceedings before the High Court seeking, among other things, an injunction to require J to give his consent. Her claim was refused on 1 October 2003, J having been found to have acted in good faith, as he had embarked on the treatment on the basis that his relationship with Ms. Evans would continue. On 1 October 2004, the Court of Appeal upheld the High Court's judgment. Leave to appeal was refused.

On 26 January 2005 the clinic informed the applicant that it was under a legal obligation to destroy the embryos, and intended to do so on 23 February 2005. The ECHR, to which the applicant had applied, requested on 27 February 2005, under Rule 39 (interim measure) of the Rules of Court, that the United Kingdom Government take appropriate measures to prevent the embryos being destroyed by the clinic before the Court had been able to examine the case. The clinic was indeed directed to postpone the embryos' destruction.

The applicant, for whom the embryos represented her only chance of bearing a child to whom she would be genetically related, underwent treatment for her condition and was deemed medically fit to continue with the implementation of embryos. It was understood that the clinic was willing to treat her, subject to J's consent.

The applicant complained to the Court that domestic law permitted her former partner effectively to withdraw his consent to the storage and use by her of embryos created jointly by them, preventing her from ever having a child to whom she would be genetically related. She based her case on Article 2 (right to life), Article 8 (right to respect for private and family life), and Article 14 (prohibition of discrimination) taken in conjunction with Article 8.

The Grand Chamber of the Court held unanimously that there had been no violation of Article 2 (right to life) of the Convention. This opinion was mainly based on the fact that there is no European consensus on the scientific and legal definition of the beginning of life³⁵; the issue of

³⁵³⁵ There is no European consensus on when human life begins or ends. The article is unclear in its application for instance to the medical termination of pregnancy, since it gives no guidance on the protection, if any, it affords to the foetus. An early application was directed against a Norwegian law which provided for the termination of pregnancy under certain conditions. The applicant asked the Commission to decide, first, whether the "right to beget offspring is an alienable human right or if not, under what conditions and circumstances this right might be forfeited", secondly,

when the right to life begins comes within the margin of appreciation which the Court generally considers that the individual states should enjoy in this sphere. Under English law, an embryo does not have independent rights or interests and cannot claim a right to life under Article 2. Therefore there had not been a violation of that provision either.³⁶

Regarding the violation of her rights to respect for private and family life under Article 8 of the Convention, which states:

- “1. Everyone has the right to respect for his private and family law...
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The Grand Chamber noted that the applicant did not complain that she was in any way prevented from becoming a mother in a social, legal, or even physical sense, since there was no rule of domestic law or practice to stop her from adopting a child or even giving birth to a child originally created in vitro from donated gametes. Her complaint was, more precisely, that the consent provisions of the 1990 Act prevented her from using the embryos she and J created together, and thus, given her particular circumstances, from ever having a child to whom she would be genetically related. The Grand Chamber considered that the more limited issue, concerning the right to respect for the decision to become a parent in the genetic sense, fell within the scope of Article 8.³⁷

The core dilemma of this case was that it involved a conflict between the Article 8 rights of two private individuals: the applicant and J. Moreover, each person's interest was entirely irreconcilable with the other's, since if the applicant was permitted to use the embryos, J would be

“whether human rights are fully applicable to the human embryo from the time of conception, of if not, at what stages in the development the development of the human individual” these rights arise. *Case X v. Norway* no. 867/60, on 29 May 1961, 6 CD 34. The Commission was unable to examine the extremely pertinent questions raised by the applicant, as he claimed not to be a victim of the law in question. Jacobs and White, 1996, p. 42.

³⁶ See paragraph 54.

³⁷ See paragraph 58. Article 8 was applicable to the Chamber's proceedings, since the notion of “private life” incorporated the right to respect for both the decisions to become and not to become a parent. The core question for the Court was “whether there exist a positive obligation on the state to ensure that a woman who has embarked on treatment for the specific purpose of giving birth to a genetically related child should be permitted to proceed to implantation of the embryo notwithstanding the withdrawal of consent by her former partner, the male gamete provider”.

forced to become a father, whereas if J's refusal or withdrawal of consent was upheld, the applicant would be denied the opportunity of becoming a genetic parent. In the difficult circumstances of the case, whatever solution the national authorities might adopt would result in the interests of one of the parties being wholly frustrated. In addition, the Grand Chamber accepted that the case did not involve simply a conflict between individuals; that the legislation in question also served a number of wider public interests in upholding the principle of the primacy of consent and promoting legal clarity and certainty, for example.

The principal issue was whether the legislative provisions as applied in the case struck a fair balance between the competing public and private interests involved. In that regard, the Grand Chamber accepted the findings of the domestic courts that J had never consented to the applicant using the jointly created embryos alone. The issues raised by the present case were undoubtedly of a morally and ethically delicate nature. In addition, there was no uniform European approach in the field. While the United Kingdom was not alone in permitting storage of embryos and in providing both gamete providers with the power freely and effectively to withdraw consent up until the moment of implantation, different rules and practices are applied elsewhere in Europe. It could not be said that there was any consensus as to the stage in IVF treatment when the gamete providers' consent became irrevocable.³⁸

While the applicant contended that her greater physical and emotional expenditure during the IVF process, and her subsequent infertility, entailed that her Article 8 rights should take precedence over J's, it did not appear to the Court that there was any clear consensus on this point either. The Court further noted that the fact that it had become technically possible to keep human embryos in frozen storage gave rise to an essential difference between IVF and fertilisation through sexual intercourse, namely the possibility of allowing a lapse of time, which might be substantial, to intervene between the creation of the embryo and its implantation in the uterus. The Court therefore considered it to be both legitimate and desirable for a state to set up a legal scheme which took that possibility of delay into account. The Human Fertilisation and Embryology Act 1990 was seen by the Court as the culmination of an exceptionally detailed examination of the social, ethical and legal

³⁸ In Hungary, for example, in the absence of a specific contrary agreement by the couple, the woman is entitled to proceed with the treatment notwithstanding the death of her partner or the divorce of the couple. In Austria and Estonia the man's consent could be revoked only up to the point of fertilisation, beyond which it is the woman alone who decides if and when to proceed. In Spain, the man's right to revoke his consent is recognised only where he is married to and living with the woman. In Germany and Italy, neither party could normally withdraw consent after the eggs have been fertilised. In Iceland, the embryos have to be destroyed if the gamete providers separate or divorce before the expiry of the maximum storage period.

implications of developments in the field of human fertilisation and embryology. This scheme placed a legal obligation on any clinic carrying out IVF treatment to explain the consent provisions to a person embarking on such treatment and to obtain his or her consent in writing. It was undisputed that it occurred in the applicant's case, and that the applicant and J both signed the consent forms required by the law. While the pressing nature of the applicant's medical condition required her to make a decision quickly and under extreme stress, she knew, when consenting to have all her eggs fertilised with J's sperm, that those would be the last eggs available to her, that it would be some time before her cancer treatment was completed and any embryos could be implanted and that, as a matter of law, J would be free to withdraw consent to implantation at any moment.

As regards the balance struck between the conflicting Article 8 rights of the parties to the IVF treatment, the Grand Chamber, in common with every other court which had examined the case, had great sympathy for the applicant, who clearly desired a genetically-related child above all else. However, given the above considerations, including the lack of any European consensus on that point, it did not consider that the applicant's rights to respect for the decision to become a parent in the genetic sense should be accorded greater weight than J's right to respect for his decision not to have a genetically-related child with her.

While the applicant criticised the national rules on consent for the fact that they could not be disapplied in any circumstances, the Court did not find that the absolute nature of the law was, in itself, necessarily inconsistent with Article 8. Respect for human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment, underlay the legislature's decision to enact provisions permitting of no exception to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material without his or her continuing consent. In addition to the principle at stake, the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency. In the Court's view, those general interests were legitimate and consistent with Article 8.

The Grand Chamber considered by thirteen votes to four, that, given the lack of European consensus, the fact that the domestic rules were clear and brought to the attention of the applicant and that they struck a fair balance between the competing interests, there had been no violation of Article 8.

It was not required to decide in the applicant's case whether she could properly complain of a difference in treatment as compared to another woman in an analogous position, because the reasons given for finding that there was no violation of Article 8 also afforded a reasonable and objective justification under Article 14. Consequently, there had been no violation of Article 14.

I certainly understand the highly difficult and challenging nature of this case. Still, I would like to elaborate on it and its proceeding a bit further. First of all, we have to keep in mind, as the Court noted, that, in any case, there will be a disregard of the rights of one party in this case, no matter what the verdict. And in this case as it turned out, it was Ms. Evans who was refused the possibility of ever having a genetically-related child.

Of course legally the Court's verdict was very well-grounded and justified, but whether it was also socially just, is completely another question.³⁹ How can one balance the rights of the applicant's former partner who was fit and capable to have biological children of his own in the future, and the rights of Ms. Evans for whom the embryos were her last chance to have a biological child, while granting that permission for implantation of the embryos would have basically enforced J to become a father against his free will? Are these persons or socially created categories equally positioned, and are we able to make fair comparisons between them?⁴⁰ It seems

³⁹ In this connection I would like to refer to Ann C. Scales' concept of the unequal treatment sometimes requires that different standards to be used for men and women. Its emphasis is upon enforced inferiority, not sex-differentiated treatment. When the aim is to discover the reality of domination, the standard to be applied depends upon the context. The inequality approach requires an investigation which must delve as deeply as circumstances demand into whether the challenged policy or practice exploits gender status. To worry in the abstract about which standards should be applied at what time is to replicate the fallacy of the differences approach. In short, the inequality approach means that we have to think more broadly about what we want "equality" to mean. The traditional bases for differentiation between the sexes are socially created categories, given meaning only by assigned biases. We create the relevant comparisons, and are free to do so *de novo* in light of social realities. Scales, 1993, p. 51. However, the Chamber did not find that the absence of a power to override a genetic parent's withdrawal of consent, even in the exceptional circumstances of the applicant's case, was such as to upset the fair balance required by Article 8 or to exceed the wide margin of appreciation afforded to the state. See paragraph 60.

⁴⁰ Perhaps the most serious flaw in the traditional liberal approach is that it accepts maleness as the norm and permits a denial of equality to women who are either unwilling, or as especially in this case, unable to assimilate to the norm. In the pregnancy context, the comparison approach is analytically problematic. The capacity or incapacity to become pregnant is unique to women; it is an inherent, not a normative sex difference. There are also problems to define clearly the distinction between a sex difference which can justify differential treatment and the one which cannot. Krieger and Cooney, 1993, pp. 162-164. See also Finley's criticism on the equality analysis on comparisons with the male norm which makes it well-suited for perpetuating existing distribution of power. Because those in power are the ones making all attributions of difference, they will see themselves as normal and everybody else as the undesirable other. If the efforts to eliminate gender hierarchy are to bear fruit, the male norm must constantly be questioned. We must redefine the standards which humans are evaluated to be more inclusive of the full range of human experience and perspective. Finley, 1993, p. 199.

that at least the Court had problems to do so, and therefore the third party was called to join the tango namely the state in the absence of European consensus on the matter and a wide margin of appreciation. The case ended up becoming an abstract problem between the supranational jurisprudence and domestic legislation⁴¹; in fact the Court was reluctant to touch upon the actual and sensitive conflicting rights and interests of the parties of the case. Instead, the Court considered that it was more appropriate to analyse the case as one concerning positive obligations, whether the legislative provisions applied in the case struck a fair balance between the competing public and private interests involved.⁴²

The Court further reasoned that, since the use of IVF treatment gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments on areas where there is no clear common ground amongst the Member States, the margin of appreciation to be afforded to the respondent State must be a wide one, which also allows the state to decide whether or not to enact legislation governing the use of IVF treatment and, once having intervened, to the detailed rules it lays down in order to achieve a balance between the competing public and private interests.⁴³

It was also pointed out by the Court that the fact that it is nowadays technically possible to keep human embryos in frozen storage gives rise to an essential difference between IVF and fertilisation through sexual intercourse, namely the possibility of allowing a lapse of time, which may be substantial, to intervene between creation of the embryo and its implantation in the

⁴¹ The Government contended that the 1990 Act served to promote a number of interrelated policies and interests – the woman’s right to self-determination in respect of pregnancy once the embryo was implanted; the primacy of freely given and informed consent to medical intervention; the interests of any child who might be born as a result of IVF treatment; the equality of treatment between the parties; the promotion of the efficacy and use of IVF and related technologies; and clarity and certainty in relations between parties. See paragraph 68. Moreover, a wide margin should be applied since the national authorities were required to strike a balance between the competing Convention interests of two individuals, each of whom was entitled to respect for private life. See paragraph 69. The fact that the act did not permit of exception, did not in itself render it disproportionate. If exceptions were permitted, the principle, which Parliament legitimately sought to achieve, of ensuring bilateral consent to implantation, would not be achieved. Complexity and arbitrariness would result, and the domestic authorities would be required to balance individuals’ irreconcilable interests, as in the present case. Paragraph 70. The Court accepts that it would have been possible for the British Parliament to regulate the situation differently in the 1990 Act, however, the central question under Article 8 was not whether different rules might have been adopted by the national legislature, but whether, in striking balance at the point at which Parliament possibly exceeded the margin of appreciation afforded to it under this Article. See paragraph 91. The Court did not want to overrule democratically adopted national legislative rule and it was not in a position to make any adjustments to it either.

⁴² Paragraph 76.

⁴³ Paragraphs 81 and 82.

uterus. The Court considered that it was legitimate, and indeed desirable, for a state to set up a legal scheme which takes this possibility of delay into account.⁴⁴

The joint dissenting opinion of the four judges who did not agree with the final verdict of the Court concluded that there had been a violation of Article 14 in conjunction with Article 8. They saw that the best way to make any comparisons in this case would have been an infertile man. They believed that the proper way to approach the case would have been to recognise that different situations require different treatments.⁴⁵ According to them a woman is in a different situation as concerns the birth of a child, including where the legislation allows an artificial fertilisation method.⁴⁶ There would be no other way for a woman in her position to secure her future prospects of bearing a genetically related child. A part of the purpose of reproductive medicine is to provide a possible solution for those who would otherwise be infertile. That purpose was frustrated if there is no scope for exceptions in special circumstances provided by the 1990 Act.

These judges came to the conclusion that the 1990 Act does not provide for the possibility of taking into consideration the very special medical condition of the applicant. It was said in the verdict that “the advantage of a clear law is that it provides certainty.” But it should also be noted that “its disadvantage is that if it is too clear – categorical – it provides too much certainty and no flexibility”.⁴⁷ In this respect they see the application of the 1990 Act in the applicant’s case to have been disproportionate.⁴⁸ This case was not only about general policy; it was most of all a case about important individual interests. In their view, the majority of the judges placed excessive weight on such general policy issues forming merely the background to this case. Certainly, states have a wide margin of appreciation when it comes to enacting legislation governing the use of IVF. However, that margin of appreciation should not prevent the Court from exercising its control, in particular in relation to question whether a fair balance between all competing interests has been struck at the domestic level.⁴⁹

The four dissenting judges were led, by the particular circumstances of the case, to believe that the applicant’s interests outweighed J’s interests and that the United Kingdom

⁴⁴ Paragraph 84.

⁴⁵ Case *Thlimmenos v. Greece* no. 34369/97, on 6 April 2000.

⁴⁶ See Joint Dissenting Opinion, paragraph 14.

⁴⁷ See Joint Dissenting Opinion, paragraphs 6 and 7

⁴⁸ *Ibidem*.

⁴⁹ Joint Dissenting Opinion, paragraph 12.

authorities' failure to take this into account constituted a violation of Article 8.⁵⁰ They saw that the case as having more at stake than the mere question of consent in a contractual sense. The values involved and issues at stake as far the applicant's situation is concerned weighed heavily against the formal contractual approach taken in this case.⁵¹

Unlike the majority, the dissenting judges considered that the domestic legislation had not struck a fair balance in the special circumstances of the case. Where the effect of the legislation is such that, on the one hand, it provides a woman with the right to take a decision to have a genetically-related child but, on the other hand, effectively deprives a woman from ever again being in this position, it inflicts such a disproportionate moral and physical burden to a woman that it can hardly be compatible with Article 8 and the very purposes of the Convention protecting human dignity and autonomy.⁵²

At least the applicant deserved the Court's sympathies and indeed it was stated by the Court that it "had great sympathy for the applicant, who clearly desired a genetically-related child above all else."⁵³ But legally it was impossible to grant this right to Ms. Evans.⁵⁴

1.1.2 The Case of *E. B. v. France*

The applicant was a 45- year old French national who was a nursery school teacher and had been living with another woman, R, a psychologist, since 1990. The application concerns the refusal of the French authorities to grant the applicant's request to adopt a child, allegedly on account of her sexual orientation. In February 1998, the applicant applied to the Jura Social Services Department for authorisation to adopt a child. During the adoption process she mentioned her homosexuality and her stable relationship with R.

⁵⁰ Joint Dissenting Opinion, paragraph 9.

⁵¹ Joint Dissenting Opinion, paragraph 10. They also had criticism regarding the Court's reluctance to give any weight to J's "assurance" element when the applicant and he were giving their formal consent to the fertility treatment. The decisive date was 12 November 2001: the date when the eggs were fertilised and six embryos created. From that moment on, J was no longer in control of his sperm. Joint Dissenting Opinion, paragraph, 8.

⁵² Joint Dissenting Opinion, paragraph 13.

⁵³ Paragraph 90.

⁵⁴ Ms. Evans' frustration may be clearly sensed in her application in which it was stated as follows: "Yet the 1990 Act permitted only one of the couple on a whim to destroy the embryos created by both; even a family pet enjoyed greater protection under the law." See paragraph 66.

On the basis of reports drawn up by a social worker and a psychologist, the adoption board made a recommendation in November 1998 that the application be rejected. Shortly afterwards the president of the council for the *département* of the Jura made a decision refusing authorisation. Following an appeal by the applicant, the president of the council for the *département* confirmed his refusal in March 1999. The reasons given for both decisions were the lack of “identification points of reference” due to the absence of a paternal image or reference and the ambiguous nature of the applicant’s partner’s commitment to the adoption plan.

The applicant lodged an application with Besançon Administrative Court, which set aside both decisions of the president of the council for the *département* on 24 February 2000. The *département* of the Jura appealed against the judgement. Nancy Administrative Court of Appeal set aside the Administrative Court’s judgement on 21 December 2000. It held that the refusal to grant the applicant authorisation had not been based on her choice of lifestyle and had not therefore given rise to a breach of Article 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the Convention.

The applicant further appealed on points of law, arguing in particular that her application to adopt had been rejected on account of her sexual orientation. In a judgement of 5 June 2002, the *Conseil d’Etat* dismissed E.B’s appeal on the grounds, among other things, that the Administrative Court of Appeal had not based its decision on a position of principle regarding the applicant’s sexual orientation, but had had regard to the needs and interests of an adopted child. The applicant lodged an application with the Court on 2 December 2002.

Relying on Article 14 of the Convention, taken in conjunction with Article 8, the applicant alleged that at every stage of her application for authorisation to adopt she had suffered discriminatory treatment that had been based on her sexual orientation and had interfered with her right to respect for her private life.

The Court reiterated at the outset that whilst French law and Article 8 did not guarantee either the right to found a family or the right to adopt⁵⁵ (which neither party contested),

⁵⁵ The right to respect for “family life” does not safeguard the mere desire to found a family; it presupposes the existence of a family. Nor is a right to adopt provided for by French domestic law or by other international instruments. Paragraphs 41 and 42.

the concept of “private life” within the meaning of Article 8 was a broad one⁵⁶ which encompassed a certain number of rights. With regard to an allegation of discrimination on grounds of the applicant’s homosexuality, the Court also reiterated that Article 14 (prohibition of discrimination) had no independent existence. The application of Article 14 did not necessarily presuppose the violation of Article 8.⁵⁷ It was sufficient for the facts of the case to fall “within the ambit” of that Article. This was the case here since French legislation expressly granted single persons the right to apply for authorisation to adopt and established a procedure to that end. Consequently, the Court considered that the State, which had gone beyond its obligations under Article 8 in creating such a right, could not then take discriminatory measures when it came to applying it.⁵⁸ The applicant alleged that, in the exercise of her right under domestic law she had been discriminated against on the grounds of her sexual orientation, which has a concept covered by Article 14. Therefore, the Article 14 of the Convention, taken in conjunction with Article 8, was applicable in the case.

After drawing a parallel with a previous case, the Court pointed out that the domestic administrative authorities, and then the courts that heard the applicant’s appeal, had based their decision to reject her application for authorisation to adopt on two main grounds: the lack of a paternal referent in the applicant’s household, and the attitude of the applicant’s declared partner. The Court found that the attitude of the applicant’s partner was not without interest or relevance in assessing the application. In the Court’s view, it was legitimate for the authorities to ensure that all safeguards were in place before a child was taken into a family, particularly where not one but two adults were found to be living in the household. In the Court’s opinion, the previous court decision had nothing to do with any consideration relating to the applicant’s sexual orientation.

With regard to the position of the domestic authorities on the lack of a paternal reference in the household, the Court considered that this did not necessarily raise a problem in itself. However, in the present case it was permissible to question the merits of such grounds as the

⁵⁶ The Court has, however, previously held that the notion of “private life” within the meaning of Article 8 of the Convention is a broad concept which encompasses, *inter alia*, the right to establish and develop relationships with other human beings (see Case *Niemietz v. Germany*, Series A, no. 251-B, on 16 December 1992), the right to “personal development” (see Case *Bensaid v. the United Kingdom* no. 44599/98, on 6 February 2001), or the right to self-determination as such (see Case *Pretty v. the United Kingdom* no.2346/02, on 29 April 2002), gender identification, sexual orientation and sexual life, which fall within the personal sphere protected by Article 8. (see, for example, Case *Dudgeon v. the United Kingdom*, Series A no. 45, on 22 October 1981), and the right to respect for both decisions to have and not to have a child (see Case *Evans v. The United Kingdom* no. 6339/05, on 10 April 2007). The Court noted that the present case raises the issue of the procedure for obtaining authorisation to adopt rather than the adoption itself. See paragraphs 43 and 44.

⁵⁷ Paragraph 47.

⁵⁸ Paragraphs 48 and 49.

application had been made by a single person and not a couple. In the Court's view, such grounds might have led to an arbitrary refusal and served as a pretext for rejecting the applicant's application on the grounds of her homosexuality, and the Government had been unable to prove that having taken this position the domestic authorities had not be discriminating against the applicant. Regarding the systematic reference to the lack of a "paternal referent", the Court disputed not the desirability of addressing the issue, but the importance attached to it by the domestic authorities in the context of adoption by a single person.

The fact that the applicant's homosexuality had featured to such an extent in the reasoning of the domestic authorities was significant despite the fact that the courts had considered that the refusal to grant her authorisation had not been based on that.⁵⁹ Besides their considerations regarding the applicant's "lifestyle", they had, above all, confirmed the decision of the president of the council for the *département* recommending that the application for authorisation be refused and giving as reasons the two impugned grounds: the wording of certain opinions revealed that the applicant's homosexuality or, other times, her status as a single person⁶⁰ had been a determining factor in refusing her authorisation whereas the law made express provision for the right of single person is to apply for authorisation to adopt. The Court considered that the reference to the applicant's homosexuality had been, if not explicit, at least implicit, and the influence of her homosexuality on the assessment of her application had not only been established but had also been a decisive factor leading to the decision to refuse her authorisation to adopt. Accordingly, it considered that the applicant had suffered a difference in treatment. If the reasons advanced for such a difference in treatment were based solely on considerations regarding the applicant's sexual orientation, this amounted to discrimination under the Convention. In any event, particularly convincing and weighty reasons had to be made in order to justify such a difference in treatment regarding rights falling within the ambit of Article 8. There were no such reasons in the present case because French law allowed single persons to adopt a child, thereby opening up the possibility of adoption by a single homosexual. Furthermore, the Civil Code remained silent as to the necessity of a referent of the other sex and, moreover, the applicant presented – in the terms of the judgement of the *Conseil d'Etat* – "undoubted personal qualities and an aptitude for bringing up children"⁶¹.

⁵⁹ The applicant alleged in the present case that, in the exercise of her right under the domestic law, she had been discriminated against on the grounds of her sexual orientation. This concept is covered by the Article 14 of the Convention. (see *Salgueiro da Silva Mouta v. Portugal* no. 33290/96, on 12 December 1999).

⁶⁰ Ms. R was the applicant's stable partner but they refused to regard themselves as a couple and Ms. R. was not involved in the plan to adopt.

⁶¹ The applicant was described by the national authorities in the following way: "Ms. B. is a good listener, is broad-minded and cultured, and is emotionally receptive. We also appreciate her clear-sighted approach to analysing problems

The Court noted that the applicant's situation had been assessed overall by the domestic authorities, who had not based their decisions on a single detail, but on "all" the factors, and considered that the two main grounds had to be examined concurrently. Consequently, the illegitimacy of one of the grounds (lack of a paternal referent) had the effect of contaminating the entire decision.

The Court concluded by ten votes to seven that the decision refusing the applicant authorisation was incompatible with the Convention and that there had been a violation of Article 14 of the Convention, taken in conjunction with Article 8. Under Article 41 (just satisfaction) of the Convention, the Court, by eleven votes to six, awarded the applicant 10,000 EUR in respect of non-pecuniary damage and 14,528 EUR for costs and expenses.

The French state contended that the application was inadmissible, since the complaint fell outside the scope of Article 8 of the Convention and, consequently, Article 14. The refusal to grant the applicant authorisation had not been based, explicitly or implicitly, on the applicant's sexual orientation and could not therefore amount to direct or indirect discrimination based on her homosexuality.⁶² The reasons for refusing her authorisation had been dictated by the child's interests alone and had been based on two grounds: lack of a paternal referent and the ambivalence of the applicant's partner's commitment to her adoption plans.⁶³

and her child-raising and emotional capacities." Paragraph 10. The psychologist examining her application recommended in the following terms that authorisation be refused: "Ms. B. has many personal qualities. She is enthusiastic and warm-hearted and comes across as very protective of others. Her ideas about child-rearing appear very positive. Several question marks remain, however, regarding a number of factors pertaining to her background, the context in which the child will be cared for and her desire for a child. Is she not seeking to avoid the "violence" of giving birth and genetic anxiety regarding a biological child?" See paragraph 11. "It is as though the reasons for wanting a child derived from a complicated personal background that has not been resolved with regard to the role as child-parent that (the applicant) appears to have had to play (*vis-à-vis* one of her sisters, protection of her parents), and were based on emotional difficulties. Has this given rise to a feeling of worthlessness or uselessness that she is trying to overcome by becoming a mother? The applicant also has unusual attitude towards men in that men are rejected. In the extreme, how can rejection of the male figure not amount to rejection of the child's own image? (A child eligible for adoption has a biological father whose symbolic existence must be preserved, but will this be within the applicant's capabilities?)" See paragraph 13. It must be noted that a psychologist had drawn up this report just on the basis of information obtained by other people working on the case and without hearing the applicant herself.

⁶² Unlike in Case *Fretté v. France*, on 26 February 2002.

⁶³ Paragraph 37. The state further pointed out that many professionals considered that a model of sexual difference is an important factor in a child's identity, and the lack of markers enabling a child to construct his/her identity with reference to a father figure must be taken into consideration. The Government cited decisions of the domestic courts in support of their submission that any other heterosexual applicant whose immediate circle of family and friends did not include a member of the opposite sex would have had their application refused on the same grounds. Paragraph 38. It was also emphasised that the lack of interest of the applicant's partner could be seen as source of insecurity for the child with the risk that the child would find him or herself in competition with the applicant's partner for the applicant's time and affection. It was further stressed that the French administrative and judicial authorities had given paramount

The applicant considered that the argument based on her partner's place in and attitude to her plan to adopt was illegal, since the Civil Code provided that adoption was open to married couples and single persons: partners were not concerned and therefore were not a party to the adoption procedure and did not enjoy any legal status once the child was adopted. The applicant contested a factor in rejection of her application that, in her opinion, had no basis in the law.⁶⁴ The applicant submitted that the difference in treatment towards her had no objective and reasonable justification. Particularly serious reasons were required to justify a difference in treatment based on sexual orientation. There were no such reasons in this case. Particularly serious reasons were required to justify a difference in treatment of homosexuals. The burden of proving the existence of any scientific reasons was on the Government's side.⁶⁵

Lastly, the Government pointed out that none of the sixty or so countries from which French people adopted children authorised adoption by same-sex couples. International adoption might therefore remain a purely theoretical possibility for homosexuals despite the fact that their domestic law allowed it.⁶⁶

The Court found it quite natural that the national authorities should enjoy a wide margin of appreciation⁶⁷ when they were asked to make rulings on the adoption procedure involving

consideration to what lay in the best interests of the child. Adoption was a measure taken for the child's protection and was designed to provide him or her with a family. There was no right to a child or right to authorisation to adopt one. Accordingly, the desire for a child must not prevail over the child's interests. Paragraph 40.

⁶⁴ Paragraph 55.

⁶⁵ The applicant disputed the existence of a "legitimate aim", since children's health was not endangered. She submitted that three risks were generally cited: first, the alleged risk of the child becoming homosexual, which quite apart from the fact that there was nothing reprehensible about such an eventuality and that the majority of homosexuals had heterosexual parents, was a prejudiced notion. Second, the child would be exposed to the risk of developing psychological problems: that risk had never been proved and recent studies showed that being raised in a homoparental family did not incline a child to any particular disorder. Lastly, there was no long-term risk that the child would suffer on account of homophobic prejudices towards the parents and, in any event, the prejudices of a sexual majority did not constitute sufficient justification. Paragraph 59.

⁶⁶ Paragraph 69.

⁶⁷ Judge Loucaides expressed in his Dissenting Opinion that the decision of the domestic authorities to refuse the applicant authorisation to adopt a child was legitimate and well within the margin of appreciation. He finds that in deciding what was the best interests of the child to be adopted, the domestic authorities could legitimately take into account the sexual orientation and lifestyle of the applicant as practised in the particular circumstances of the case, namely the fact that the applicant cohabited with the same-sex partner. He continues, that the erotic relationship with its inevitable manifestations and the couple's conduct towards each other in the home could legitimately be taken into account as a negative factor in the environment in which the adopted child was expected to live. He continues, that homosexuals, like anybody else, have a right to be themselves and should not be the target of discrimination or any other adverse treatment because of their sexual orientation. However, they must, like any other person with some peculiarity, accept that they may not qualify for certain activities which, by their nature and under certain circumstances, are incompatible with their lifestyle or peculiarity. See pp. 37 and 39.

considerations to protect the health and rights of children.⁶⁸ However, the argument of the lack of a paternal referent in the household might have led to an arbitrary refusal by the national authorities and have served as a pretext for rejecting the applicant's application on grounds of her homosexuality, since it was a question of an adoption by a single person provided by the national law.⁶⁹ According to the Court the question of the attitude of the applicant's partner, with whom she stated that she was in a stable and lasting relationship, is not without interest or relevance in assessing her application. The partner's attitude and the role he or she will necessarily play on a daily basis in the life of the child joining the home set-up requires a full examination in the child's best interest. The legal capacity of a person seeking to adopt is not incompatible with an examination of his or her actual life situation.⁷⁰

The Court observed that the manner in which certain opinions of the national authorities were expressed was indeed revealing in that the applicant's homosexuality was a determining factor for refusing her application for adoption. The psychologist from the children's welfare service recommended that authorisation be refused, referring to, among other things, an "unusual attitude (on the part of the applicant) to men in that men are rejected".⁷¹ The Court observes that at times it was her status as a single person that was relied on as a ground for refusing the applicant authorisation to adopt, whereas the law makes express provisions for the right of single persons to apply for authorisation to adopt. The same psychologist stated that "all the studies on parenthood show that a child needs both its parents", also the representative of the adoption board from the Family Council recommended refusing authorisation on the grounds that an adoptive family had to be composed "of a mixed couple (man and woman)".⁷² The precautions taken by the Nancy Administrative Court of Appeal, and subsequently by the *Conseil d'Etat*, to justify taking account of the applicant's "lifestyle" led to the inescapable conclusion is that her sexual orientation was consistently at the centre of deliberations and present at every stage of the administrative and judicial proceedings.⁷³ The influence of the applicant's avowed homosexuality on the assessment of her application has been established and was a decisive factor leading to the decision to refuse her authorisation to adopt.⁷⁴ The applicant therefore suffered a difference in treatment. A difference in treatment is discriminatory if it has no objective and reasonable

⁶⁸ In the Dissenting Opinion of Judge Zupančič he says that when set against the absolute right of the child, all other rights and privileges pale, p. 35.

⁶⁹ Paragraph 73.

⁷⁰ Paragraph 76.

⁷¹ Paragraph 85.

⁷² Paragraph 86.

⁷³ Paragraph 88.

⁷⁴ Paragraph 89.

justification, which means that it does not pursue a “legitimate aim” or that there is no “reasonable proportionality between the means employed and the aim sought to be realised” Where sexual orientation is an issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding the rights falling within Article 8.⁷⁵

In this connection, the Court observes that the Convention is a living instrument, to be interpreted in the light of present-day conditions.⁷⁶ If the reasons advanced for such a difference in treatment were based solely on considerations regarding the applicant’s sexual orientation this would amount to discrimination under the Convention. The Court pointed out that French law allows single persons to adopt a child, thereby opening up the possibility of adoption by a single homosexual, which is not disputed. Against the background of the domestic legal provisions, it considered that the reasons put forward by the Government could not be regarded as particularly convincing and weighty such as to justify refusing to grant the applicant authorisation.⁷⁷ The Court noted further that the relevant provisions of the Civil Code are silent as to the necessity of a referent of the other sex, which would not, in any event, be dependent on the sexual orientation of the adoptive single parent.⁷⁸ The Court could not but observe that, in rejecting the applicant’s request for authorisation to adopt, the domestic authorities made a distinction based on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention.⁷⁹

1.2. RIGHT NOT TO HAVE A CHILD

As I have mentioned earlier, the right to have a child is not explicitly mentioned in the Convention. The same applies to the right not to have a child, or more precisely the right to birth control, but the cases related to this right are constructed through other rights and freedoms of the Convention.

1.2.1. The Case of *D. v. Ireland*

The applicant is a 45-year old Irish national who already had two children. She became in late 2001 pregnant with twins. In early 2002, an amniocentesis indicated that one foetus had died in the womb and that the second foetus had a chromosomal abnormality known as 18 or Edward’s Syndrome. A

⁷⁵ Paragraphs 90 and 91.

⁷⁶ Paragraph 92.

⁷⁷ Paragraphs 93 and 94.

⁷⁸ Paragraph 95.

⁷⁹ Paragraph 96.

second amniocentesis confirmed these findings. D. was made to understand that Edward's Syndrome was fatal and that the average survival age for children with the syndrome was six days. She therefore decided that she could not carry the pregnancy to term.⁸⁰

D. went to the United Kingdom for an abortion. She did not seek legal advice as to her eligibility for an abortion in Ireland. At that time, the only recognised exception to the constitutional prohibition of abortion was "a real and substantial risk to the life of the mother" where the risk is taken to include the possibility of the mother's suicide. This exception was established in the case *Attorney General v. X* (1992) where a 14-year-old pregnant girl who had been raped threatened to commit suicide if denied an abortion.⁸¹

The abortion was performed in the United Kingdom.⁸² D. could not remain in the United Kingdom thereafter and could not therefore take advantage of counselling on, amongst other things, the genetic implications for future pregnancies although she was given some statistical information about the recurrence of the abnormality. The applicant required some follow-up

⁸⁰ Paragraph 3. "The applicant was devastated by the loss of her twins and dismayed by the prospect of carrying the pregnancy to term. She felt unable to tolerate the physical and mental toll of a further five months of pregnancy with one foetus dead and with the other one dying. She did not consider any legal proceedings in Ireland at that point, but rather made arrangements to travel to the United Kingdom for an abortion...While she explained her wish to terminate the pregnancy to Doctors X and Y, they were "very guarded" in their responses indicating that they "appreciated that she was not eligible for an abortion in Ireland". Hospital B "thought that she could not take her notes with her if she travelled abroad". She did not clarify whether she brought a copy of her file and medical records to the UK or who made the appointment for her but confirmed that she had been "unable to obtain referral"." Paragraph 4.

⁸¹ X was a 14-year old girl who became pregnant as a result of rape. Her parents took her to the UK for an abortion and then raised with the Irish police the question of having scientific tests carried out on retrieved foetal tissue with a view to determining paternity. The Director of Public Prosecutions was consulted, who, in turn, informed the Attorney General. On 7 February 1992 an interim injunction was applied for by the Attorney General. It was obtained on an *ex parte* basis to restrain X from leaving the jurisdiction or from arranging or carrying out a termination of the pregnancy. X and her parents returned from the UK to contest the injunctions. The State undertook to pay the costs of the defendant minor, irrespective of the result. On 17 February 1992 the High Court granted an interlocutory injunction in essentially the same terms. On 26 February 1992, on appeal, a majority (4 to 1) of the Supreme Court discharged the injunctions. The Supreme Court held that, if it were established as a matter of probability, that there was a real and substantial risk to the life, as distinct from the health, of the mother and that this real and substantial risk could only be averted by the termination of her pregnancy, such a termination was lawful. The Supreme Court accepted the evidence that had been adduced in the High Court that the girl had threatened to commit suicide if compelled to carry her child to full term and deemed this threat of suicide to constitute a real and substantial risk to the life of the mother. Paragraph 19. However, it must be kept in mind that some of the *obiter dicta* of the majority in the Supreme Court also indicated that the constitutional right to travel could be restrained so as to prevent an abortion taking place in circumstances where there was not threat to the life of the mother: the right to travel simply did not take precedence over the right to life. Paragraph 21. The Thirteenth Amendment was framed in negative terms so that one could not be prevented from travelling abroad to have an abortion but the amendment was never intended to give a new substantial right to travel abroad to have an abortion. Paragraph 34.

⁸² The applicant chose the medical induction option (leading to 24 hours labour) as she felt it was the option most respectful of the second foetus. She transported the foetus to Ireland for a discrete burial. Paragraph 6.

medical treatment in Ireland but she explained to the hospital and to her own family doctor that she had had a miscarriage.⁸³

The applicant complained about the lack of abortion services in Ireland in the case of lethal foetal abnormality, a situation that she saw as unnecessarily exacerbated by the Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995. Section 5 and 8 of the 1995 Act limit what a doctor can tell a pregnant woman with a lethal foetal abnormality and prohibit that doctor from making proper arrangements, or a full referral, for a therapeutic abortion abroad. She also complained that she had been discriminated against as a pregnant woman or as a pregnant woman with a lethal foetal abnormality.

She relied on Article 1 (obligation to respect human rights), Article 3 (prohibition of inhuman or degrading treatment)⁸⁴, Article 8 (right to respect for private and family life)⁸⁵, Article 10 (right to receive information)⁸⁶, Article 13 (right to an effective remedy), and Article 14 (prohibition of discrimination)⁸⁷ of the Convention.

The Court noted that, at the relevant time, a legal constitutional remedy was in principle available to the applicant to obtain declaratory and mandatory orders with a view to obtaining a lawful abortion in Ireland. It was particularly important in a common law system to

⁸³ Paragraph 7.

⁸⁴ The applicant complained that her situation as a whole amounted to a failure to fulfill a positive obligation to ensure that she was not subjected to “inhuman and degrading” treatment. Paragraph 59.

⁸⁵ The applicant argued that there was a disproportionate interference with an intimate and personal aspect of her private and family life and/or a failure to fulfill a positive obligation to protect those Article 8 rights. In these respects, she pointed out that she was the person primarily concerned with the pregnancy; that the State might have had a certain margin of appreciation but not an unfettered discretion in this area; that particularly serious reasons were required to justify an interference with “a most intimate part of an individual’s private life”, that she would have preferred to have had a full and open discussion with her specialist; and that she did all she could to respect the foetus. By denying the few women in her situation an abortion in Ireland through the overall ban on abortion, the State put an unduly harsh burden on such women: it was arbitrary and draconian, made worse by the information restrictions set down by the 1995 Act. Paragraph 59.

⁸⁶ It is good to remember the violation of Article 10 in the Case of *Open Door and Dublin Well Woman v. Ireland*, Series A, no. 246-A, on 29 October 1992, which led to the entry into force of the Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995. The Court concluded that Ireland had not satisfied the requirement of proportionality and the state had violated Article 10 of the Convention, protecting the right to freedom of expression. The applicants had not complained of the substantive prohibition on abortion *per se*. However, the Court pointed out that the applicants were providing information on services lawfully available in other states and that those services could be crucial to a woman’s health and well-being. See paragraph 18 and Mullally, 2005, p. 87. The present applicant submitted that her right to receive information had been violated in that sections 5 and 8 of the 1995 Act imposed unnecessary restraints on what a doctor could tell her and prohibited that doctor making proper arrangements, or a full referral, for an abortion abroad.

⁸⁷ The applicant further complained that that she was discriminated against as a pregnant woman or as a pregnant woman with a lethal foetal abnormality: a person with a serious medical problem would never have encountered such difficulties in obtaining medical care and advice. Paragraph 60.

allow the courts to develop constitutional protection for fundamental rights by way of interpretation, particularly when the central issue was a novel one, requiring a complex and sensitive balancing of the constitutionally enshrined equal rights to life and demanding a delicate analysis of country-specific values and morals.⁸⁸ The X case⁸⁹, which had recognised an exception to the constitutional prohibition on abortion when the mother's life was at risk from self-harm, had shown that the constitutional courts could develop the protection of individual rights by way of interpretation and had thereby demonstrated the importance of providing those courts with the opportunity to do so. The presumption in the X case was that the foetus had a normal life expectancy, and there was, in the Court's view, a feasible argument to be made that the constitutionally enshrined balance between the right to life of the mother and of the foetus could have shifted in favour of the mother when the "unborn" suffered from a abnormality incompatible with life.

The Court further did not accept that the remedy was not accessible to the applicant or that she would not have been able to obtain legal representation in what would have been a landmark case. In addition, since abortions (in the case of a "real and substantial risk" to the mother's life) were already available in Ireland and since the evidence was that the "Masters" of the main obstetric hospitals⁹⁰ were not against termination in the case of fatal foetal abnormality, the Court considered that the relevant declaratory and mandatory orders could have been implemented in good time. The Court concluded that there was a constitutional remedy in principle available to the applicant, although some uncertainty attached to three relevant matters arising from the novelty of the substantive issue and the procedural imperatives of the applicant's position – the chances of success, the limited time available to conclude the proceedings (the applicant had only six weeks

⁸⁸ The Eighth Amendment of the Constitution: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right." Paragraph 16. This constitutional amendment was accepted by the voters in 1983, and Article 40.3.3. grants the "unborn" a right to life equal to that of the pregnant woman.

⁸⁹ In 2002 a third referendum on abortion was called. The objective of the proposed Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill was to resolve the legal uncertainty since the X case, by putting this draft legislation to the electorate: it proposed to permit abortions to be lawfully provided in Ireland at specific institutions but only when, in the opinion of the doctor, it was necessary to prevent a real risk of loss of the woman's life, other than self-destruction. The Bill intended therefore to restrict the ruling in the X case by excluding the risk of suicide as a ground for the lawful termination of a pregnancy. On the event of the referendum, three Masters urged people to vote in favour of this Bill and stated that the State should sanction abortion in certain cases including when a foetus would not survive outside of the womb. This bill differed from earlier proposals in that it protected the foetus' right to life only following implantation in the womb, thereby allowing for the use of contraceptives such as the morning-after pill. However, a twelve year prison sentence was proposed for any woman who performed abortion on herself or for any person aiding and abetting a woman in performing an abortion. Mullally, 2005, p. 90. The proposal was defeated in the referendum. Paragraphs 43-45.

⁹⁰ Medical professionals of the three major obstetric hospitals in Dublin where 40% of Irish births take place. Paragraph 40.

left before the expiry of the 24-week period in which abortion was normally available in the UK) and the guarantees that her identity would be kept confidential.

However, the Court was of the view that, having regard to the potential and importance of the constitutional remedy in a common law system, especially concerning the issue in question, the applicant could reasonably have been expected to have taken certain preliminary steps. She should have obtained legal advice on those substantive and procedural uncertainties and issue a Plenary Summons allowing her to apply for an urgent, preliminary and *in camera* hearing to obtain the High Court's response to her timing and publicity concerns. It was true that it was assumed that the applicant would continue during those steps an already advanced pregnancy. However, the Court was satisfied on the evidence that such preliminary steps could have been completed without disclosing the applicant's identity and in a matter of days and, further, that the evolution of those initial steps would have elucidated some of the uncertainties and allowed her to assess the effectiveness of the remedy in her situation as the days went by. In the absence of those preliminary steps, the Court was unable to dismiss as ineffective the constitutional remedy available in principle to the applicant.

The Court therefore concluded that the applicant had not exhausted the domestic remedies for obtaining permission to have an abortion in the case of fatal foetal abnormality. The Court further noted that the limitations of the 1995 Act, about which applicant complained also under Articles 3, 8 and 10, concerned abortion services abroad and had no application to a lawful abortion in Ireland. Consequently, the applicant's failure to pursue domestic remedies as regards obtaining a lawful abortion in Ireland meant that her complaint about the 1995 Act, together with her associated complaints under Article 13 and 14, had also to be rejected on the grounds of a failure to exhaust domestic remedies. By a majority, the Court declared the application inadmissible.

The applicant emphasised how important the continuity of medical care was for someone in her position and that it had been interrupted: if she had not had to travel abroad she could have been cared for in a local hospital with her own doctor's pre- and post-abortion care.⁹¹ She reiterated that her profound distress was exacerbated by the draconian regime in Ireland

⁹¹ The 1995 General Practitioners Guidelines were not relevant since foetal abnormalities were diagnosed in hospitals. The guidelines made no mention of abortion for women so diagnosed nor did they address the special post-abortion needs of women in her situation.

requiring her to travel abroad and to leave behind the comfort of the familiar, by the associated lack of information or support and by the lack of post-abortion services and facilities.⁹² She maintained that the legal position contributed to the stigma attached to abortion in Ireland added to the already heavy psychological weight of an abortion. She considered that she had given sufficient substantiation of her submission that she was distressed and depressed – a situation which was augmented by the regulation of abortion in Ireland.⁹³

As to the 1995 Act, she essentially argued that the Act's restrictions were so broadly drafted and its sanctions of such severity that Irish doctors were intimidated, guarded and cautious and were put off communicating with their patients about abortion in a free and frank manner. It was no answer for the Government to seek to shift the responsibility for the harm, inflicted by the underlying legislative and constitutional limitations, to her efforts to alleviate its impact. There may have been no criminal prosecutions under the 1995 Act as yet, but that was simply because doctors erred on the side of caution.⁹⁴

As to whether she had complied with the requirement to exhaust domestic remedies generally, she confirmed that the idea of legal action had never entered her mind at the time of the diagnosis. However, a number of obstacles stood in the way of her exhausting the constitutional remedy proposed by the Government. In the first place, she argued that such a case had no prospects of success. There was no “real and substantial risk” to her life (she was not suicidal) and that was the only accepted termination possibility in Ireland: abortion in the case of a strong negative impact on her physical or mental health was insufficient given the “equal rights” of the foetus under the Constitution. No ruling allowing a termination in Ireland for foetal abnormality had ever been obtained. She had simply no plea to make: indeed, the Eighth Amendment itself was designed to be restrictive and self-executing. There was no legal agreement on when the foetus became an “unborn” for the purposes of Article 40.3.3: even the Government was rather non-

⁹² Annually around 6000 women having an abortion in the UK give an Irish address. The number has been declining since the year 2005. Most probably Irish women are increasingly seeking for abortion services in other countries than in the UK, for instance in the Netherlands. See at www.crisispregnancy.ie. (Consulted on 23 April 2008).

⁹³ See paragraph 75.

⁹⁴ Paragraph 75. The 1995 Act merely deals with information relating to services lawfully available outside the State for the termination of pregnancies and the persons who provide such services. The condition under which such information may be provided are two-fold. The person imparting the information is: (i) not permitted to advocate or promote the termination of pregnancy to the woman or any person on her behalf; (ii) not permitted to give the information unless it is given in a form and manner which do not advocate or promote the termination of pregnancy. Paragraph 30. The State argued that the 1995 Act only prohibited a doctor doing two things: (a) giving “act information” in a manner which advocated or promoted abortion; and (b) making the initial appointment or having a formal arrangement with an abortion provider. In short, the 1995 Act allowed non-directive advice, assistance and counselling by doctors. Paragraph 69.

committal on the point. Without any prospect of success, she would have obtained no interlocutory ruling. Certain official publications (notably the Green Paper on Abortion) and academic comment at the time confirmed that legal position. In any event, the Government had not demonstrated how any declaration could have ensured that she would have actually obtained an abortion in Ireland in the time left to her. As to the timing of any proceedings, the results of an amniocentesis are not reliable until the 14th week of pregnancy so that her situation was not definitive until after that test and, reasonably, its confirmation. She could not then (at her 17th/18th week) put her pregnancy on hold so she was in a different position to the ordinary litigant: she had a small window of opportunity. Any constitutional challenge would have taken time to prepare, the High Court would have had to hear the case immediately and it would have been incumbent on the State to appeal to obtain the Supreme Court's view in the unlikely event there was a High Court finding in her favour. The applicant concluded that the burden of exhausting domestic remedies in the circumstances was excessive having regard, in addition, to the following: she was 17-18 weeks pregnant with twins and had just received confirmation that one foetus was dead and that the other was effectively dying; she would have been forced into adversarial proceedings with the latter foetus, which would be represented by the State appointed lawyers; she might have been required to give oral evidence and be cross-examined; and the State would have been entitled to her medical records.⁹⁵

In the light of the recent developments in Ireland, I do not wonder Ms. D. had doubts about the success of her legal proceeding, therefore I personally think that the Court should have proceeded with the present case. The Court itself has “recognised that Article 35 (the rule of exhaustion of domestic remedies) must be applied with some degree of flexibility and without excessive formalism...It has further recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as personal circumstances of the applicants...”⁹⁶ The Court also stated that: “...the only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and

⁹⁵ See paragraphs 76, 77, 78 and 82. Section 8(2) of the 1995 Act does not prohibit or in any way prevent giving to a woman any medical, surgical, clinical, social or other like records relating to her. Paragraph 31.

⁹⁶ Paragraph 77 in the Case of *Selmouni v. France*, no. 25803/94, on 28 July 1999.

effectiveness; it falls to the respondent State to establish that these various conditions are satisfied...
„⁹⁷

The Irish state admitted that the issue of abortion in Ireland involves a delicate mingling of social attitudes, values and legal provisions and the decisions of the Supreme Court in that respect demonstrated both the difficulty of the issue and the care with which the Irish courts have considered them.⁹⁸ It further stated in the Constitution Review Group Report 1996 which was not able to reach consensus on the matter as follows:

“Although thousands of women go abroad annually for abortions without breach of domestic law, there appears to be strong opposition to any extensive legalisation of abortion in the State. There might be some disposition to concede limited permissibility in extreme cases, such, perhaps, as those of rape, incest or other grave circumstances. On the other hand, particularly difficult problems would be posed for those committed in principle to the preservation of life from its earliest stage.”⁹⁹

However, I do not wonder the applicant’s concerns on taking a legal proceeding in Ireland for, as she alluded in her oral submissions, she had “sought advice, informally, from a friend who was a lawyer” who had “told her that if she wrote to the authorities to protest, the State might try and prevent her travelling abroad for a termination” and that she was “not prepared to take this

⁹⁷ Paragraph 75 in the Case of *Selmouni v. France*, no. 25803/94, on 28 July 1999. “It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant’s complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement...” *Ibidem*, paragraph 76.

⁹⁸ Paragraph 65.

⁹⁹ Paragraph 32.

risk”.¹⁰⁰ I think that her concerns were not merely imaginative in their nature¹⁰¹, especially if we see them in the light of the recent case of “Miss D2.”¹⁰².

At the end of April in 2007 a legal dispute took place between a pregnant teenager, also known as “Miss D” [D2] and the Health Service Executive (HSE: Ireland’s social services). She had been taken into care under an interim care order. She was living together with her boyfriend and was pregnant. On her seventeenth birthday she attended hospital for a scan and was told that her baby had no head. The official diagnosis was that her baby had anencephaly: a neural tube defect, which means that a large part of the skull and brain is missing. The condition is fatal. Miss D2 decided that she wished to terminate her pregnancy. The HSE’s reaction was extraordinary: it wrote to the police to ask them to arrest D2 if she tried to leave the country. And it told the Passport Office not to issue D2 with a passport. On 30 April D2’s boyfriend started a challenge on her behalf to establish her right to leave the country. D2 said that it was her body and her right to decide what happened to it. The HSE opposed her application for judicial reviewing saying that “it could not get involved” in D2’s plan to terminate her pregnancy.

Referring to the Case of D. who lost her case in Strasbourg because she had failed to exhaust her domestic remedies in the Irish courts, Hewson¹⁰³ wondered why Miss D2 had to travel at all if foetuses with lethal anomalies are not protected by the Constitution and women in that situation can be treated in Ireland. However, the High Court judge asked whether the HSE considered that an abortion was in Miss D2’s best interests, the answer was “No”. On 5 May the HSE asked the District Court to authorise Miss D2’s travel. The District Judge refused, saying his obligation to the unborn prohibited the making of such an order. On 9 May the High Court decided that there was no legal obstacle whatever to Miss D2’s travelling, and was critical of the HSE. The litigation is estimated to have cost one million euros.¹⁰⁴

¹⁰⁰ Paragraph 102.

¹⁰¹ The Case *A & B v. C.* which concerned a 13-year old traveller girl in care who had been raped, and was at risk of suicide. The local authority sought the court’s permission to take her abroad for an abortion, which was granted. But the judge said by referring to the 1992 constitutional amendment that “This amendment...was intended to prevent injunction against travel or having an abortion abroad. A court of law, in considering the welfare of an Irish child in Ireland and considering whether on health grounds a termination of pregnancy was necessary, must, I believe, be confined to considering the grounds for termination which would be lawful under the Irish Constitution and cannot make a direction authorising travel to another jurisdiction for a different kind of abortion.” Available at www.abortionreview.org. Consulted on 24 April 2008.

¹⁰² I have used number 2 only to distinguish Ms. D. from Miss D.

¹⁰³ Barbara Hewson is a barrister at Hardwicke Building in London, and was counsel for D. in the Case of *D. v. Ireland*.

¹⁰⁴ Available at www.abortionreview.org. (Consulted on 24 April 2008).

Everything considered, it might turn out that the older Ms. D. did win the case. At least she proved her incredible strength as a person. As a result of the strain, she and her partner separated; she stopped working and re-studied; she took grief counselling, acupuncture, a holiday and genetic counselling. While Doctor X referred her to a psychiatrist in early 2003, she did not continue after the first visit for reasons of cost and because, since then, “she had moved on”.¹⁰⁵

1.2.2. The Case of *Tysic v. Poland*

The applicant, Alicja Tysic, is a Polish national who was born in 1971 and lives in Warsaw. She has suffered for many years from severe myopia (approximately -20 dioptries in each eye), and she was assessed by a State medical panel, for the purposes of social insurance, as suffering from a disability of medium severity. The applicant decided to consult several doctors when she discovered in February 2000 that she was pregnant for the third time, as she was concerned that her pregnancy might have an impact on her health.¹⁰⁶

The three ophthalmologists who the applicant consulted each concluded that there would be a serious risk to her eyesight if she carried the pregnancy to term. However, they refused to issue a certificate for the pregnancy to be terminated on therapeutic grounds¹⁰⁷ despite the applicant’s requests to that effect. The applicant also consulted a general practitioner, who issued a certificate stating the risks to which her pregnancy left her exposed on account of the problems with her eyesight and the consequences of giving birth after two previous deliveries by caesarean.¹⁰⁸

By the second month of her pregnancy, in April 2000, the applicant’s myopia had already deteriorated to a level of -24 dioptries in each eye. On 26 April 2000 Ms. Tysic was given an appointment at the gynaecology and obstetrics department of a public hospital in Warsaw with a

¹⁰⁵ Paragraph 8.

¹⁰⁶ It was also advised by the doctor that the applicant should consider sterilisation after the birth. Paragraph 10.

¹⁰⁷ Abortion is prohibited in Poland except under certain conditions as set out in the 1993 Family Planning, Protection of the Human Foetus, and Conditions Permitting Pregnancy Termination Act (when pregnancy endangers the mother’s life or health; when prenatal tests indicate a high risk that the foetus will be severely and irreversibly damaged; when there are strong grounds for believing that the pregnancy is a result of a criminal act). Paragraphs 34 to 38. Originally the Catholic parliamentary deputies tried to introduce a bill that included a five-year prison term for women who had abortions. In response, middle-class women in cities and university towns organised the Polish Feminist Association and Pro Femina, while hundreds of local committees pressured the parliament to reject the criminalisation of abortion. Together these women’s groups gathered 1.5 million signatures calling for a referendum on whether or not women should be punished for having abortions. The final bill enacted into law in 1993 did criminalise most abortions, but it punished the doctors who performed them rather than the women who sought them. Equally important, as a result of the women’s politicisation in the early 1990s, women’s percentage of seats in the Polish parliament doubled. Freedman, 2002, p. 244.

¹⁰⁸ On the basis of this certificate the applicant would have been able to terminate her pregnancy lawfully. Paragraph 10.

view to terminating the pregnancy. She was examined by the head of the department, Dr. R.D., who found that there were no medical grounds for performing a therapeutic abortion.¹⁰⁹ The applicant was therefore unable to have her pregnancy terminated and gave birth to her third child by caesarean in November 2000. Following the delivery, the applicant's eyesight deteriorated considerably as a result of what was diagnosed as a retinal haemorrhage.¹¹⁰ A panel of doctors concluded that her condition required treatment and daily assistance and declared her to be significantly disabled.¹¹¹

The applicant lodged a criminal complaint against Dr. R.D., but the investigation was discontinued by the district prosecutor on the basis that there were no causal link between the doctor's decision and deterioration of the applicant's eyesight.¹¹² Moreover, no discriminatory action was taken against the doctor.¹¹³

Ms. Tysi c, who is raising her three children alone, is now registered as significantly disabled and, on this account, receives a monthly pension equivalent to 140 euros. She cannot see objects more than 1,50 meters away and fears that she will eventually become blind.

Ms. Tysi c's application was lodged with the Court on 15 January 2003. She considered that she satisfied the statutory conditions for access to abortion on therapeutic grounds. She maintained that the fact that she was not allowed to terminate her pregnancy in spite of the risks

¹⁰⁹ Dr. R.D. examined the applicant visually and for a period of less than five minutes, but did not examine her ophthalmological records. At the end of the appointment Dr. R.D. told the applicant that she could even have eight children if they were delivered by caesarean section. Paragraphs 13 and 14.

¹¹⁰ As the changes to her retinas were at a very advanced stage, there were no prospects of having them corrected by surgical intervention. Paragraph 17.

¹¹¹ Paragraph 18.

¹¹² During the investigation neither Dr. D.R. nor Dr. B., who had co-signed the certificate of 26 April 2000, were interviewed. The district prosecutor observed that the deterioration in Ms. Tysi c's eyesight "had not been caused by gynecologist's actions, or by any other human action." Paragraph 23. Personally I would ask also about the inaction taken by the medical professionals in this case. But I guess the argument would be the same as the Forum of Polish Women: "The rights guaranteed by Article 8 of the Convention imposed on the State an obligation to refrain from arbitrary interference, but not an obligation to act." Paragraph 96. The prosecutor, when asked for assistance in reading her file, had repeatedly refused to assist, even though he had been aware that the applicant was suffering from very severe myopia. The applicant had been unable to read the document in the case file, which had affected her ability to exercise her procedural rights in the course of the investigation. Paragraph 26.

¹¹³ The District Court found that the hemorrhage in the applicant eyes had in any event been likely to occur, given the degree and nature of the applicant's condition. The court did not address the procedural complaint which the applicant had made in her appeal against the district prosecutor. Paragraph 29. Further the Chamber of Physicians found that Dr. R.D. and Dr. B. had not been guilty of professional negligence. Paragraph 30.

to which she was exposed amounted to a violation of Article 3 (prohibition of torture)¹¹⁴, Article 8 (right to respect for private and family life), and Article 13 (right to an effective remedy). She further complained that no procedural and regulatory framework had been put in place to enable a pregnant woman to assert her right to a therapeutic abortion, thus rendering that right ineffective. Finally, relying on Article 14 (prohibition of discrimination), she alleged that she had been discriminated against on the grounds of her sex and her disability.

Under the circumstances of the applicant's case, the Court found that the facts did not reveal a breach of Article 3 and considered that it was more appropriate to examine Ms. Tysi c's complaints under Article 8. The Court observed that, under the 1993 Pregnancy Termination Act, abortion was lawful in Poland where pregnancy posed a threat to the woman's life or health and that it was, therefore, not the Court's task, in the applicant's case, to examine whether the Convention guaranteed a right to have an abortion.¹¹⁵

The Court found that the case related to Ms. Tysi c's right to respect for her private life, reiterating that legislation regulating the interruption of pregnancy touched upon the sphere of private life, since, whenever a woman was pregnant, her private life became closely connected with the development of the foetus. The Court decided to examine the complaint from the standpoint of the State's positive obligation under Article 8 to secure the physical integrity of mothers-to-be.¹¹⁶

The Court observed that it was not in dispute that from 1977 Ms. Tysi c suffered from severe myopia. The Court stressed that it was not its role to question the doctors' clinical judgment as regards the seriousness of the applicant's condition but found it sufficient to note that Ms. Tysi c feared that the pregnancy and birth might further endanger her eyesight and that those fears, in the light of her medical history and the advice she had been given, could not be said to have been irrational.

Having regard to the general context, the Court noted that, according to the Polish Federation for Women and Family Planning, doctors were often deterred from authorising an abortion, it being essentially a criminal offence in Poland punishable by up to three years

¹¹⁴ The Court reiterates its case-law on the notion of ill-treatment and the circumstances in which the responsibility of a Contracting State may be engaged, including under Article 3 of the Convention by reason of the failure to provide appropriate medical treatment. Paragraph 66.

¹¹⁵ Paragraph 104.

¹¹⁶ Paragraphs 106 and 107.

imprisonment if the conditions specified in the 1993 Act were breached.¹¹⁷ Doctors were particularly reticent in the absence of transparent and clearly defined procedures to determine whether the legal conditions for a therapeutic abortion were met. The Polish Government had even acknowledged deficiencies in the manner in which the Act had been applied. With that in mind, the Court noted that once the legislature had decided to allow abortion, it must not structure its legal framework in such a way as to limit the use of that possibility. Furthermore, it should ensure some form of procedure before an independent and competent body, which, after having had the opportunity to hear the pregnant woman in person, issues prompt and written grounds for its decision. The Court, bearing in mind the very nature of the issues involved in deciding to terminate a pregnancy, observed that the procedures in place should also ensure that such decisions are timely so as to limit or prevent damage to a woman's health.

Against that general background, the Court examined how the legal framework regulating the availability of a therapeutic abortion in Polish law had been applied to Ms. Tysi c's case and how it addressed her concerns about the possible negative impact of pregnancy and birth on her health.¹¹⁸

Firstly, the Court noted that the Government had referred to an Ordinance by the Minister of Health of 22 January 1997 which provided a procedure governing the decisions on therapeutic abortion and that the procedure, based on medical considerations, was relatively simple and enabled relevant measures to be taken promptly. However, the Court found that the Ordinance did not provide any particular procedural framework to address and resolve the disagreement as to the advisability of therapeutic abortion, either between the pregnant woman and her doctors, or between the doctors themselves. Secondly, it noted that the Government referred to Article 37 of the 1996 Medical Profession Act which allows a doctor, in the event of therapeutic doubts, or at a patient's request, to obtain a second opinion from a colleague.¹¹⁹ However, the Court emphasised that the provision, having only been addressed to members of the medical profession, did not give patients a procedural guarantee to obtain such an opinion or to contest it in the event of

¹¹⁷ Paragraph 41.

¹¹⁸ The Polish Government were of the view that in the applicant's case the conditions for lawful termination on health grounds as defined by the 1993 Act had not been satisfied. Paragraph 68. The applicant argued that the 1993 Act provided only that it was merely the threat to the pregnant woman's health which made an abortion legal. The actual materialisation of such a threat was not required. And she further continues, that in any event, and regrettably, in the applicant's case this threat had materialised and brought about a severe deterioration of her eyesight after the delivery. Paragraph 78.

¹¹⁹ Paragraph 40.

disagreement. This provision also did not address the more specific issue of a pregnant woman seeking a lawful abortion.¹²⁰

The Court therefore concluded that Polish law, applied to the applicant's case, did not contain any effective mechanism capable of determining whether the conditions to obtain a lawful abortion had been met.¹²¹ That created a situation of prolonged uncertainty for Ms. Tysi c and, as a result, she suffered severe distress and anguish about the possible negative consequences on her health of her pregnancy and the imminent birth. The Court was of the opinion that the provisions of Polish civil law on tort did not give Ms. Tysi c the opportunity to uphold the right to respect for her private life either. Those provisions were retroactive and could only have resulted in the courts granting compensation. Similarly, criminal proceedings against Dr. R.D. could have prevented the damage to the applicant's health from arising. The Court therefore found that retrospective measures alone did not provide appropriate protection for the physical integrity of individuals in such a vulnerable position as Ms. Tysi c.¹²²

With regard to the circumstances of the case as a whole, the Court concluded that, within a context of a controversy such as entitlement to a therapeutic abortion, the Polish State had failed to safeguard Ms. Tysi c's right to the effective respect for her private life and that there had therefore been a breach of Article 8. Observing that Ms. Tysi c's complaint under Article 13 essentially overlapped with the issues examined under Article 8, the Court held that no separate issue arose under Article 13. The Court, having regard to its reasoning for finding a violation of Article 8, did not consider it necessary to examine the applicant's complaints separately under Article 14.

¹²⁰ A need for such safeguards becomes all the more relevant in a situation where a disagreement arises as to whether the preconditions for a legal abortion are satisfied in a given case, either between the pregnant woman and her doctors, or between the doctors themselves. In the Court's view, in such situations the applicable legal provisions must, first and foremost, ensure clarity of the woman's legal position. Paragraph 116.

¹²¹ As the Polish Federation for Women and Family Planning and the Polish Helsinki Foundation for Human Rights put in a sentence: "There were no guidelines as to what constitute a threat to a woman's health or life within the meaning of section 4 (a). It appeared that some physicians did not take account of any threat to a woman's health as long as she was likely to survive the delivery of a child." Paragraph 93.

¹²² The applicant contended that in the circumstances where there had been a fundamental disagreement between her, a pregnant woman fearful of losing her eyesight as a result of a third delivery, and her doctors, it had been inappropriate and unreasonable to leave the task of balancing fundamental rights to doctors exclusively. In the absence of any provisions for a fair and independent review, given the vulnerability of women in such circumstances, doctors would practically always be in a position to impose their views on access to termination, despite the paramount importance their decisions have for a woman's private life. The circumstances of the case revealed the existence of an underlying systemic failure of the Polish legal system when it came to determining whether or not the conditions for lawful abortion obtained in a particular case. Paragraphs 85 and 118.

By six votes to one, the Court found that there had been a violation of Article 8 and awarded the applicant 25,000 EUR in respect of non-pecuniary damage and 14,000 EUR for costs and expenses (less 2,442.91 EUR received by way of legal aid from the Council of Europe).

Poland's strict abortion law had already raised concerns regarding the women's access to lawful services in the country, as the ICCPR Committee noted in its fourth periodic report's conclusions in 1999:

“The Committee notes with concern: (a) strict laws on abortion which lead to high numbers of clandestine abortions with attendant risks to life and health of women; (b) limited accessibility for women to contraceptives due to high prices and restricted access to suitable prescriptions; (c) the elimination of sexual education from the school curriculum; and (d) the insufficiency of public family planning programmes.

The State party should introduce policies and programmes promoting full and non-discriminatory access to all methods of family planning and reintroduce sexual education at public schools.”¹²³

The Polish Government, in the fifth periodic report submitted to the Committee estimated that the number of abortions concluded illegally in Poland numbered 80,000 to 200,000 annually. At the same time, the State admitted that the law's provisions are not fully implemented and that some women, in spite of meeting the criteria for an abortion, are not subject to it. There are refusals to conduct an abortion by physicians employed in the public health care system units who invoke the so called conscience clause, while at the same time women who are eligible for a legal abortion are not informed about where they should go. It happens that women are required to provide additional certificates, which lengthens the procedure until the time when an abortion becomes hazardous for the health and life of the woman.¹²⁴

As non-governmental organisations have reported, the anti-abortion law of 1993 has resulted in many negative consequences for women's reproductive health in Poland. For example, many women who are entitled to legal abortions are often denied this right in the local hospitals. In

¹²³ Paragraph 48. Originally in Document CCPR/C/SR.1779, Arts. 3, 6, 9 and 26.

¹²⁴ Paragraph 49.

practice, abortions on social grounds are not stopped but simply pushed “underground”, as women seeking abortions can either find a doctor who would perform it illegally or go abroad. The effects of the strict abortion law are felt primarily by the poorest and uneducated members of the society, as illegal abortions are expensive.¹²⁵

Lack of knowledge about family planning lowers women’s quality of life and narrows their choices. Their sexuality is endangered either by constant fear of unwanted pregnancies or by seeking unsafe abortion. There is a strong disapproval and obstruction towards those who choose abortion under the few conditions that still allow for it to be carried out. Doctors and hospitals frequently misguide or misinform women, who are legally entitled to terminate pregnancies, thereby placing the life and health of the women seriously at risk. Doctors (and even whole hospitals, even though they have no right to do so) often refuse to perform abortions in hospitals they work in, invoking the so-called clause of conscience – the right to refuse to perform abortions due to one’s religious beliefs or moral objections – or even giving no justifications, creating problems as long as it is needed to make performing an abortion impossible under the law. There exists however a well organised abortion underground – terminations are performed illegally in private clinics, very often by the same doctors who refuse to perform abortions in hospitals. The average cost of abortion is more or less equal to the country’s average gross monthly salary.¹²⁶

It was also noted by the Centre of Reproductive Rights that the legislation of many other member States contained express language underscoring a woman’s rights to dignity and autonomous decision-making within the context of requests for and provisions of abortion services. For instance Norwegian and French legislation strongly emphasise the women’s autonomy and active participation throughout the process in which the access to abortion is decided.¹²⁷ In Poland the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility are causing a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case. The provisions regulating the availability of lawful abortion should be formulated in such a way as to alleviate this effect. Once the legislature decides

¹²⁵ Paragraph 51. Originally in a report prepared by ASTRA Network on Reproductive Health and Rights in Central and Eastern Europe for the European Population Forum held in Geneva in 2004.

¹²⁶ Paragraph 51. Originally in a report prepared by ASTRA Network on Reproductive Health and Rights in Central and Eastern Europe for the European Population Forum held in Geneva in 2004.

¹²⁷ Paragraph 89.

to allow abortion it must not structure its legal framework in a way which would limit real possibilities to obtain it.¹²⁸

CHAPTER 2

THOUGHTS BASED ON THE CASE-LAW

The European Court has emphasised the fact that the scope of the margin of appreciation enjoyed by the national authorities will depend not only on the nature of the aim of the restriction but also on the nature of the rights involved.¹²⁹ There is a hierarchy of rights and the right to respect for private and family life is given strong, but not absolute protection against state interference. For instance, the Court in *Dudgeon* noted: the legislation affected “a most intimate aspect of private life”, thus the interference can be justified only by “particular serious reasons”.¹³⁰ However, in *Handyside* the Court acknowledged that there was no “uniform European conception of morals” in the member states. The requirements of morals, as the Court stated, varied from time to time and from place to place. What can be regarded as necessary in one state may seem to be disproportionate in another. In this regard the state authorities can better assess the necessity of a restriction, and the international judge exercise only a supervisory function.¹³¹ The margin of appreciation is modified by the degree to which common practices and policies are discerned among the member states. The main purpose of the Convention is to “lay down certain international standards to be observed by the Contracting States in their relations with persons under their jurisdiction.”¹³² This does not mean that complete uniformity is required, as the states are free to choose the measures which they consider as appropriate. The mere fact that a state is out of line with European consensus is not sufficient reason for finding a violation of the Convention, especially where the issue is closely linked to cultural and national traditions.¹³³

¹²⁸ Paragraph 156.

¹²⁹ Case *Gillow v. the United Kingdom* no. 9063/80, on 24 November 1986, A109 and Case *Blecic v. Croatia* no. 59532/00 on 29 July 2004.

¹³⁰ Case *Dudgeon v. the United Kingdom* no. 7525/76, on 23 September 1981, A45, paragraph 52.

¹³¹ Case *Handyside v. the United Kingdom* no. 5493/72, on 4 November 1976, A24, paragraph 48.

¹³² Case “*Relating to certain aspects of the laws on the use of languages in education in Belgium*” v. *Belgium* no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, on 23 July 1968, A6.

¹³³ Schokkenbroek, 1998, p. 34.

However, the Court has frequently pointed out that the Convention was designed to maintain and promote the ideals and values of a democratic society. In the common heritage of the member states – in the view of the Court – the underlying values of the Convention can be found. The unity principle found in the Preamble states that “the aim of the Council of Europe is the achievement of greater unity between its members” and that one of the methods by which this is to be achieved is “the maintenance and further realisation of human rights and fundamental freedoms”. The observance of human rights is best secured through the common understanding and observance by the member states.¹³⁴ Brian Walsh believes that the philosophy and recognition of inalienable and absolute rights of the individual are woven into the Convention.¹³⁵ It is dubious whether the Central and Eastern European countries joining in the early 1990’s share the same tradition. The issue of the European consensus always arises where there are states differing from the mainstream standards. The Convention cannot aim to set up a uniform system for protecting human rights; rather its mandate is to lay down a minimum level of compatibility. This minimum level, which is commonly accepted by the majority of the states, is represented by the European consensus.¹³⁶

The goal of the Europe-wide human rights protection to offer a uniform standard in every member state can be achieved through a long process. As Macdonald notes, this progress must be gradual, since the whole system is resting on the fragile foundation of the consent of the contracting parties. The margin of appreciation doctrine provides the necessary flexibility required for the political acceptance of the Convention organs, and saves them from fierce and unnecessary confrontation with the states. Seeking a European standard is one of the methods used to narrow the scope of the margin of appreciation of the national authorities.¹³⁷

The Convention as a modern document must be responsive to the current European conditions and attitudes. However, the scientific and social developments are not sufficient: there must be some degree of evolution in the legislation of the member states. The Court can only acknowledge the already existing European standard based on a consensus among the majority of the member states, but in principle it is not empowered to go ahead.¹³⁸ However, the standards of the Convention are reflective of social changes. The evolving approach to interpretation implies that

¹³⁴ Green, 2000, p. 19.

¹³⁵ Walsh, 1987, p. 273.

¹³⁶ Polgári, 2005/2006, p. 14.

¹³⁷ “The margin of appreciation gives flexibility needed to avoid damaging confrontations between the Court and the Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligations under the Convention.” Macdonald, 1993, p. 123.

¹³⁸ Polgári, 2005/2006, p. 15.

the Court takes into account the contemporary realities and attitudes, and not the situation prevailing at the time of the drafting of the Convention.¹³⁹ It would seem that the Court has a tendency to be progressive in that sense that it has gradually extended and raised the level of protection afforded to the rights and freedoms guaranteed by the Convention to develop the “European public order”.¹⁴⁰ The evolving theory of interpretation places greater emphasis on contemporary cultural and sociological notions as gender equality or sexual orientation, and not on the legislative history.¹⁴¹ This way of interpretation necessarily leads to the activist approach meaning that the judges may legitimately be influenced by the spirit of times, his or her personal values and the needs of an individual or a particular group.¹⁴²

The fact that society disapproves of certain social practices, like, for instance, homosexual acts, divorces or abortion cannot ever constitute a reason for inequality of treatment. The purpose of the Convention is to stop the majority from taking away the right of the individual. However, as far as the Convention limits the minority complaints are less likely to be raised or heard, but when the protected group is a minority against the majority, the objection of being undemocratic is voiced in a loud manner. The Court has adopted an interpretation, which must be in conformity with “the general spirit of the Convention itself”, i.e., the verdict must serve ends to maintain and promote the ideas and values of democratic society, which is based on tolerance, diversity and liberal values.¹⁴³ As the Court specified in *Young, James and Webster v. the United Kingdom*: “democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.”¹⁴⁴ Many liberals have argued that an absolute constitutional prohibition on abortion denies non-Catholics equal rights to citizenship in Ireland and would perpetuate a politics of exclusion. However, hard-core anti-abortionists have continued to represent abortion as a violent colonial tool threatening the integrity of the Irish nation.¹⁴⁵

¹³⁹ *Johston and Others v. Ireland* no. 9697/82 on 18 December 1986, A112. Paragraph 53.

¹⁴⁰ See the joint dissenting opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner in *Hatton and Others v. the United Kingdom* no. 5856/72, on 25 April 1978, A 26. Paragraph 31.

¹⁴¹ Yourow, 1996, p. 186.

¹⁴² Polgári, 2005/2006, pp. 62 and 64. See definitions of legal activism in the article written by John W. Dean, *What is Judicial Activism? The Charges Made against the President’s Judicial Nominees* at www.writ.news.findlaw.com. (Consulted on 6 May 2008).

¹⁴³ See the Case *Kjeldsen, Busk Madsen and Pedersen v. Denmark* no. 5095/71; 5920/72; 5926/72, on 5 November 1976, A23.

¹⁴⁴ Case *Young, James and Webster v. the United Kingdom* no. 7601/76; 7806/77 on 13 August 1981, A44, paragraph 63.

¹⁴⁵ Mullally, 2005, p. 13.

The right to “private life” is used by the Court in a very broad way encompassing, *inter alia*, aspects of an individual’s physical and social identity including the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings and the outside world. It incorporates the right to respect for both the decisions to become or not to become a parent.¹⁴⁶

Judge Mularoni also refers to the Case of *Evans v. the United Kingdom* in her Dissenting Opinion of the Case of *E.B. v. France* judgement. She reiterates that it is indisputable that Article 8 on the private life does not guarantee a right to found a family and that such a right is guaranteed by Article 12 of the Convention. And whilst a “right” to adopt does not exist, she considers, in the light of the case-law, which over the years has brought more and more rights and possibilities within the ambit of Article 8, that the time has come for the Court to assert that the possibility of applying to adopt a child under domestic law falls within the ambit of Article 8. Consequently, Article 14 would be applicable. All applicants who are in the same personal situation of either being unable or finding it extremely difficult to conceive should be protected in the same way by the Convention regarding their legitimate desire to become parents, whether they choose to have recourse to techniques of artificial insemination or seek to adopt a child in accordance with the provisions of domestic law. She does not see any strong arguments in favour of a difference of treatment in these cases.¹⁴⁷

There is no European consensus on adoption by same-sex couples with only nine out of forty-six member States of the Council of Europe moving towards allowing such an adoption. Some countries are making adoption available to single persons but claiming the right in practice might be very difficult for single persons,¹⁴⁸ since child psychiatrists and psychoanalysts keep on defending different theories, with a majority arguing that a dual maternal and paternal referent in the home is necessary.¹⁴⁹

¹⁴⁶ *Evans v. the United Kingdom*, paragraph 71.

¹⁴⁷ See the Case *E.B. v. France*, pp. 41 and 43. She further continues that the decision whether or not to grant single persons the possibility of adopting a child is within the State’s margin of appreciation; once such a possibility has been granted, however, requiring a single person to establish the presence of a referent of the other sex among his or her immediate circle of family and friends runs the risk of rendering ineffective the right of single persons to apply for authorisation.

¹⁴⁸ See Case *E.B. v. France*, paragraphs 61 and 65.

¹⁴⁹ I would give as my lay person’s argument that it must be better for a child not to have a paternal referent at all if it happens to be abusive. But obviously these experts are talking about some kind of ideal father figure. I also would like to argue that implicitly these theories are stating that children living in single-parent families are in a less-favourable position. The statistics prove widespread domestic violence, in particular of husbands violence towards the wives and minors. In France six women die each month at the hands of men who profess to love them. A study undertaken by the

Under the case-law of the Convention institutions the legal protection of life afforded by Article 2 is not extended to the foetus as was observed in the Case *Evans v. the United Kingdom*. Under the case law “(t)he life of the foetus was intimately connected with, and could not be regarded in isolation from the life of the pregnant woman.”¹⁵⁰ The Court itself has observed that legislative provisions as to when life commences fall within the State’s margin of appreciation, but it has rejected suggestions that the Convention ensured such protection. It had noted that the issue of such protection was not resolved within the majority of the Contracting States themselves and that there was no European consensus on the scientific and legal definition of the beginning of life.¹⁵¹

The whole system of rights protection of the Court is a delicate balance between national sovereignty and international obligations. Furthermore, the margin of appreciation and certain degree of difference is essential to accommodate cultural, religious, economic and social diversity of the member states. The effective protection requires that the right balance has to be struck between individual and state interests.¹⁵²

CHAPTER 3

ELABORATION OF THE CONCERNS RELATED TO REPRODUCTIVE AUTONOMY

In this chapter, I will elaborate a little bit more precisely on those concerns related to reproductive autonomy. I will try to shed some light on the background of these concerns and fears which make states deny reproductive rights to their citizens.

forensic services of the Paris hospital system indicates that over 60 women are killed annually by their partners in Paris alone. “We have no idea of how many women are maimed or mutilated or how many endure years of terror”, says Marie-Dominique de Suremain of the National Federation of Women’s Solidarity. Children who are witnesses to abuse, even though they are not victims themselves, are 1,000 per cent more likely to be future abusers or victims. They are also six times more likely to commit suicide, 24 times more likely to commit a sexual assault, 50 per cent more likely to abuse drugs and alcohol, and 74 per cent more likely to commit crimes against others. Navarane, 2004 at www.hinduonnet.com. (Consulted on 5 June 2008).

¹⁵⁰ European Commission of HR, Case *X. v. the United Kingdom* no. DR 19, on 13 May 1980.

¹⁵¹ Case *Vo v. France* no. 53924/00, on 8 July 2004.

¹⁵² Macdonald, 1993, pp. 123-124.

3.1. Citizen versus Authoritarian State

The bottom-line question in all of these cases seems to be a conflict between an individual citizen and an authoritarian state¹⁵³, which the Court on its turn tries to resolve. There is a clear tension between pre-modern authoritarian discourse¹⁵⁴ which is challenging liberal democracy's concept of individuality causing legal conflicts between the states presenting so called collective good and individual citizens who would like to lead their lives according to their own wishes and values in their specific life circumstances.

As the Forum of Polish Women reiterates the conflict between the rights of an individual and the state: "In any event, the mere fact that abortion was lawful in certain situations, as an exception to a general principle, did not justify a conclusion that it was a solution preferred by the State."¹⁵⁵ Or as follows: "However, a gynaecologist could refuse to perform an abortion on grounds of conscience. Therefore, a patient could not bring a doctor to justice for refusing to perform an abortion and hold him or her responsible for the deterioration in her health after the delivery."¹⁵⁶

The Court defines the balance between the state and the individual in the very same case in this way: "(...) while the Convention does not guarantee as such a right to any specific level of medical care, the Court has previously held that private life includes a person's physical and psychological integrity and that the State is also under a positive obligation to secure to its citizens their right to effective respect for this integrity."¹⁵⁷ "While the State regulations on abortion relate to the traditional balancing of privacy and the public interest, they must – in case of a therapeutic abortion – be also assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be."¹⁵⁸

¹⁵³ The contemporary concept of human rights arose in response to the omnipotence of state regimes over individuals. Heinze, 1995, p. 32.

¹⁵⁴ I use the concepts of pre-modernity and modernity in a sociological or "Giddensian" way. I am well aware of the highly contradictory and contested nature of these concepts, and by this approach I have tried to rule out some of the negative connotations related to these terms. However, for Giddens "modernity" refers to modes of social life or organisation which emerged in Europe from about the seventeenth century onwards and which subsequently became more or less worldwide in their influence. Giddens, 1990, introduction, p. 1.

¹⁵⁵ Case *Tysic v. Poland*, paragraph 99.

¹⁵⁶ Case *Tysic v. Poland*, paragraph 100.

¹⁵⁷ Case *Tysic v. Poland*, paragraph 107.

¹⁵⁸ Case *Tysic v. Poland*, paragraph 107.

In both negative and positive contexts a fair balance has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation. The Court observes that the notion of “respect” is not clear-cut, especially as far as those positive obligations are concerned. The notion of “respect” will receive a number of interpretations given the diversity of practices in different states and given the wide variety cases brought before the Court. Nonetheless, for the assessment of positive obligations of the State it must be borne in mind that the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention. Compliance with requirements imposed by the rule of law presupposes that the rules of domestic law must provide a measure of legal protection against arbitrary interference by public authorities with the rights safeguarded by the Convention. It should be further borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. Whilst Article 8 contains no explicit procedural requirements, it is important for the effective enjoyment of the rights guaranteed by this provision that the relevant decision-making process is fair and such as to afford due respect to the interests safeguarded by it. An individual should have a chance to be involved in the decision-making process, seen as a whole, to a degree sufficient to provide her or him with the requisite protection of their interests.¹⁵⁹

The Dissenting Opinion of Judge Borrego Borrego in the Case *Tysiąc v. Poland* also illuminates this tension very well. He was very critical of the verdict stating first of all that the Court is neither a charity institution nor the substitute for a national parliament. He was also referring to the decision concerning the application *D v. Ireland* and he wondered why the Court’s decision is so different in the case he was judging. He further pondered the concept of margin of appreciation in the debate on abortion. In Ireland’s case, it was described as being “sensitive, heated and often polarised”. In the present case, the Court, according to him, neglected the debate concerning abortion in Poland. Furthermore he cited the Court’s decision as follows: “This is particularly the case when the central issue is a novel one, requiring a complex and sensitive balancing of equal rights to life and demanding a delicate analysis of country-specific values and morals. Moreover, it is precisely the interplay of the equal right to life of the mother and the “unborn”...” He saw that Poland’s case was processed only by focusing on the State’s positive obligation of “effective respect” for private life in protecting the individual against arbitrary

¹⁵⁹ Case *Tysiąc v. Poland*, paragraphs 111-113. The applicant further submitted that the Polish authorities had attached little weight to her particular vulnerability as a disabled person suffering from a very severe eyesight impairment bordering on blindness. She maintained that, as a result, she had not been involved in the investigation to a degree sufficient to provide her with requisite protection of her interests. Paragraph 138.

interference by the public authorities. No reference was made to “the complex and sensitive balancing of equal rights to life...of mother and the unborn” as mentioned in *D v. Ireland*. He saw that the Court was, in fact, imposing a new, more liberal abortion law to Poland,¹⁶⁰ despite the Polish national legislation, unanimous and strong experts’ opinion against the applicant’s fears and distress. He ended his dissenting opinion with a rhetorically very powerful paragraph by stating: “All human beings are born free and equal in dignity and rights. Today the Court has decided that a human being was born as a result of a violation of the European Convention on Human Rights. According to this reasoning, there is a Polish child, currently six years old, whose right to be born contradicts the Convention.”¹⁶¹

3.2. On Artificial Insemination

There are great individual and social fears related to artificial insemination which partly originate from its history as a technology introduced to serve eugenic purposes which existed at the beginning of the 20th century.¹⁶² It was seen as a tool for a quality control with respect to human reproduction. Early scientists viewed the procedure as a method of population control, not only in the quantitative sense but also in the qualitative one. It was their belief that most men would store their sperm and undergo sterilisation, ensuring the opportunity to produce offspring in the future. It was planned that the sperm banks would enlist only the most intelligent and aesthetically pleasing males to collect sperm from in an attempt to promote the production of superior human beings. Nowadays many sperm-donors do it either for purely monetary or altruistic reasons. Many men find, however, artificial insemination too accessible and fear that women will opt for alternative

¹⁶⁰ Legislation has also a pedagogical function. For instance, legislation against racial discrimination has as its object the shaping of people’s moral thinking. Heinze, 1995, p. 206. The same applies to laws against killing, beating, speeding, littering, and all evils of great and small. This might be also the Court’s intention regarding the Poland’s domestic abortion legislation.

¹⁶¹ Case *Tysic v. Poland*, Dissenting Opinion of Judge Borrego Borrego, paragraphs 3-8, 11-12 and 15.

¹⁶² The first recorded case of artificial insemination dates from the year 1884. She was a Quaker. The wife of a merchant, and the infertility patient of Dr. William Pancoast. She was a woman whose name was never recorded. Dr. Pancoast, a professor at Jefferson Medical College in Philadelphia, had already examined and tested her numerous times. Finally, he discovered that she was fertile and that the problem was her husband’s; there were no sperm. Pancoast (or maybe it was one of his students) had an idea. He called her in. He just wanted to examine her once more. The woman lay on the table as she had been told to do. Pancoast’s six medical students - all young men - stood around her body. Pancoast anesthetized the woman with chloroform. He took the receptacle into which one of his students had masturbated. With a hard rubber syringe, he inserted the student’s semen into her uterus. He then plugged her cervix with gauze. When she awoke, he did not tell her what he had done. He never told her. Nine months later, she bore a son. This was the first reported human artificial insemination with donor semen which in fact was a rape. Corea, 1985.

methods of reproduction. They feel that their role in reproductive process is being diminished by the new technologies.¹⁶³

However, the difference between men and women's role in reproduction should be captured in legal form. Egg donation, gestation and birth connect women to the process of reproduction in a more intimate and sustained fashion than sperm donation connects men. Infertility treatment for women is very painful and might be even physically dangerous, and pregnancy is open to many different kinds of complications. Pregnancy and child-caring also leave women vulnerable to many social and economic implications, which can be seen in their less-favourable labour market position with lower salaries and stagnant career positions compared to their male colleagues. This is not the same as saying that men and women's emotional connections to reproduction are necessarily different. But it is to say that there is a material difference in the physical contribution that men and women make to reproduction. One way in which law has captured this material difference is by denying men the power to regulate a woman's pregnancy against her will. She can opt out of reproductive responsibility without the permission of her male partner. The recognition of this right is the farthest the law goes in recognising the need to prioritise women's interest during the particular context of pregnancy.¹⁶⁴

It would seem that women have a legally wider autonomy regarding the termination of pregnancy in Europe than in respect to artificial insemination and the use of her own genetic material. Of course we have to exclude those states with extremely strict abortion laws from this estimation. In many countries artificial insemination was defined only by professional codes of

¹⁶³ The Rights of Women, Men and Children with Respect to Artificial Insemination. www.fubini.swartmore.edu. (Consulted on 17 May 2008). There are mainly two types of negative response to new reproductive technologies: that they are unnatural and disrupt the order of things, or that they devalue reproduction by subjecting it to the interests of those who make profits from the promotion of technology. This approach is a conservative one which supports the status quo and objects to the changes which new reproductive technologies represent; changes in the relationships between nature and technology and changes in the social arrangements which become possible. The second sort of objection is an anti-commodification argument which believes that market principles are damaging to human/social relationships. Fletcher, 2006, pp. 39-40. However, humankind has always sought to adapt its own nature and that of its external world to cater for its needs and desires, and nature has continually changed in this process. The point for materialist feminism is more that of biology itself changes dialectically in its interaction with technology, so that there is no pre-technological biology to return to. We can change the outcome of this relationship by understanding how it has come about and by acting so as to influence its current and future articulation, but not by undoing it. *Ibidem*, p. 41.

¹⁶⁴ Fletcher, 2003, p. 235. In *Case H v. Norway*, the applicant argued that the Convention must grant the father of a 14 week old foetus a minimum of rights regarding his unborn child, where the health of the mother is not endangered. The Commission found his application inadmissible. It concluded that any interpretation of the potential father under the Convention, in connection with an abortion which the mother intends to have performed on her, must first of all take into account her rights, she being the person primarily concerned by the pregnancy and its continuation or termination. Any possible interference with the applicant's rights under the Convention was justified as being necessary for the protection of the rights of another person. *Case H v. Norway* no. 17004/90, on 19 May 1992.

conduct for a long time but, once it was turned into legislation, it seems that it is defined in a very strict and precise manner.

The Council of Europe's Steering Committee on Human Rights has come to the conclusion that Article 12 of the Convention (the right to marry and found a family) may not be interpreted as "a right to procreate, if need be, in the absence of natural capacity, by means of artificial procreation". In this respect also the right to health is limited for two reasons. Firstly, it is arguable and generally accepted by the Steering Committee that the incapacity to reproduce does not constitute a state of ill-health. Secondly, States cannot be expected to ensure access to very costly artificial reproductive technologies to every individual in need.¹⁶⁵ However, World Health Organisation recognised already in 1965 that under the auspices of family planning, building a family should be free choice of the individual couple.¹⁶⁶

3.3. On Same-Sex Couples and Families

In the light of the French case it would seem that the Court's approach to family life is still quite hetero-normative,¹⁶⁷ however the case of *E.B. v. France* would indicate that there is willingness to protect individual gays' rights in respect to discrimination even without granting the right to family relations in the same manner as for heterosexual couples.¹⁶⁸ Before this case, the Convention had protected the "family life" of homosexuals only in relation to their biological children.¹⁶⁹ It can be argued that this essentialist approach might be reinforcing the dichotomy of the dominant category of heterosexual man and the "other" into which "women" and "gays" fall into. "The dominated"

¹⁶⁵ Packer, 1998, p. 82.

¹⁶⁶ According to the joint WHO-DHS Comparative Report in 2004, based on data evaluated up to mid-2000, one in four ever-married women of reproductive age in most developing countries are suffering from infertility. www.who.int. (Consulted 11 July 2008).

¹⁶⁷ Social organisation referring exclusively to the biological mother-father-children paradigm. Heinze, 1995, p. 33. Sexuality has become organised not by categories of eroticism or expression of "inherent" in nature, but by conventional, culturally determined norms, within the population at large, within the powerful institutions of church, law and State, and within the increasingly influential discourses of social and natural sciences. *Ibidem*, p. 57.

¹⁶⁸ As the Court stated in *Rees v. the United Kingdom* that marriage in Article 12 "refers to the traditional marriage between persons of opposite biological sex" and... "is mainly concerned to protect marriage as the basis of the family" Case *Rees v. the United Kingdom* no. 9532/81, on 17 October 1986.

¹⁶⁹ Grigolo, 2003, p. 1037. The Court had far from establishing protection against majority sentiments – which is presumably a central purpose of human rights – the Court largely endorses them. The Court itself admitted that, by the time sexual minorities had finally found favour in its eyes, law reform had already been completed in most Member States. Before those domestic reforms had taken place – at the time when gays might genuinely have benefited from the rights which international regimes promised – the Court was silent. Far from challenging prevailing social norms, the "evolving consensus" doctrine makes them deciding factor. It is also difficult to argue that the "evolving consensus" doctrine was used in a very progressive manner by the Court, as it adopted the lowest possible benchmark among the member states. The Court's willingness to apply human rights only in ways which confirm some discernible *status quo* among a sufficient number of Member States. Heinze in Cook and Ulrich (eds), 2002, pp. 209-211.

ones are forced to define themselves and act politically within those binary conceptual and cultural limits set by “the dominant” which represents itself as “the natural order of things”.¹⁷⁰ I would still argue that this naturalised approach does not reflect the diversity of the present social reality therefore causing unnecessary suffering and alienation for many individuals. Similarly, many hetero-sexuals are experiencing, as Anthonhy Giddens puts it, an increased “relational mobility”, evidenced by the rise in the number of divorces and changing circumstances of many family arrangements, i.e., the contemporary shift from marriages to relationships.¹⁷¹ For such persons, a relationship is no longer primarily a means to achieve an end such as reproduction, but it is an end itself. De-traditionalization of family arrangements, scientific developments, and increased equality between male and female partners, is creating possibilities for self-determination in matters of sexual choices and relationships, as well as creating new challenges to the legislation.¹⁷²

However, the realistic hopes of same-sex couples for legal recognition as families have not been fulfilled yet. Following the logic of the Strasbourg organs¹⁷³, the child’s right to respect for family life would be only protected in relation to his/her biological parent.¹⁷⁴ There is an obvious split between private and public demands: while it is beyond doubt that the state has a very narrow discretion in relation to the private life of homosexuals, the margin of appreciation is broader when it comes to claims to establish relationships or families, i.e., stepping out of the closet into the public life.¹⁷⁵ As regards the family rights of gays and lesbian parents, their sexual orientation seems to be considered a critical variable in determining the suitability of a family

¹⁷⁰ Grigolo, 2003, p. 1025. It must be separately noted that law has been quite silent regarding women’s homosexuality which has, by no means, entailed greater sexual freedom for women. Indeed, it is precisely the traditional greater sexual freedom of men which appears to have prompted more explicit regulation. Women, often being considered as mere property and been directed towards marriage and motherhood from a young age, leaving them with less autonomy than men, which has, in turn, meant that female homosexuality has hardly been regulated by the law. Heinze, 1995, p. 55.

¹⁷¹ Jack Baker argued in 1970 that only marriage can guarantee the symbolic benefits of full equality for gays. Until marriage is a right, it should be demanded because “when any minority allows itself to be denied a right that is given to others, it is allowing itself to be relegated to a second-rate position”. However, not everybody wants to get married, therefore, the rights and benefits should be granted as much as possibly independently of any marital or any other legally recognised status. Grigolo, 2003, pp. 1041 and 1043.

¹⁷² No sexual identity or relationship exists in abstraction from a wider social context. Those same historical developments which gave rise to what can be called “lifestyle heterosexuality”, in which marriage and family have come to be based more on individual choice than on parental or community dictates, and which, historically, is no more familiar in many cultures than lifestyle homosexuality. A genuinely “scientific” discourse of sexuality had to strip away the layers of social factors – wealth, class, religion, status – until the only factor which remained was biological sex: marriage became *scientifically* meaningful not as a union of aristocrat with aristocrat, or Catholic with Catholic, or worker’s child with worker’s child, but as a union of male and female, i.e., only as a heterosexual and biological union. Any other kind of relationship, or identity, became constructed with reference to that one. Heinze in Cook and Ulrich (eds.), 2002, pp. 220-221.

¹⁷³ The name used for the institutions of the Council of Europe due to their location in Strasbourg.

¹⁷⁴ This approach seem to be supported by the Case of *Salgueiro Da Silva Mouta v. Portugal* no. 33290/96, on 21 December 1999.

¹⁷⁵ Michele, 2003, p. 1037.

environment for a child's healthy development. The reasoning based on the best interest of the child and the notion that gay parents might influence their children's psychological development, and make them gay is based on the assumption that homosexuality is an undesirable and conditioned pattern of behaviour.¹⁷⁶ It is also interesting to note that in the case of a refusal to terminate an unwanted pregnancy, the state authorities do not concern themselves with the family or social situation of the unborn child; there are no demands for "the referent point of the opposite sex" or father's important role in the child's life and healthy development. It seems that as long as a mother is most probably able to survive after the birth everything is fine and demands for the child's best interests are not voiced.

3.4. On Abortion

There is, in the UK, some of the most liberal legislation on abortion in Europe, which stands in contrast to that, for example, Ireland and Poland which I have looked at in this study. During the 1930s, women's groups and members of parliaments were deeply concerned about the great loss of life and damage to health resulting from unsafe, illegal abortion in the UK. The Conference of Co-operative women was the first organisation to pass a resolution (1934) calling for the legalisation of abortion. The Abortion Law Reform Association was established in 1936. The Abortion Act came into effect on 27 April 1968. The Act on medically assisted insemination, introduced in 1990, regulates experiments on embryos and controls application of new technologies which had been developed to help infertile couples. Despite attempts to use this law to restrict abortion rights, the 1990 Act in fact only lowered the legal time limit from 28 to 24 weeks, which is the currently accepted point of viability in the UK. It also clarified the circumstances under which abortion could be obtained at a later stage.¹⁷⁷ On 22 May 2008, the UK parliament retained 24-week upper gestation limit for most abortions. Ann Furedi, Chief Executive of the British Pregnancy Advisory Service, believes that the time is right to debate on how to make it easier for women to access abortion, for instance by giving up the present system of two doctors to certify that a woman meets the legal ground for abortion. Presently the law can be interpreted to provide abortion when a pregnancy is unwanted – because it is accepted that an unwanted pregnancy is a threat to woman's mental health.¹⁷⁸

¹⁷⁶ Polgári, 2005/2006, pp. 44-45.

¹⁷⁷ Abortion Rights. The National Pro-choice Campaign. www.abortionrights.org.uk (Consulted on 17 May 2008).

¹⁷⁸ See at www.futureofabortion.org. (Consulted on 5 June 2008)

In the light of the case-law on abortion it is hardly necessary to raise the issue of the social aspects of abortion.¹⁷⁹ Because, for example, it is well-known that only fairly wealthy women can afford to travel to seek for abortion services abroad. Most probably the women who are most urgently in need of abortion due to social reasons cannot even dream about this possibility in Ireland or Poland. Actually, the most vulnerable women in these societies have very little freedom of choice no matter what reasons they have for wanting to have their pregnancy terminated. The fact is that legal proceedings require financial resources and access to legal services, as well as time and persistence. A woman in distress caused by her situation, whether related to the right to become or not to become a parent, might have other concerns in her mind than first of all filing a court case. However, as the Court sees it, a lack of financial means does not absolve an applicant from making some attempt to initiate legal proceedings and the costs should not, as a matter of principle, constitute a reason to classify a constitutional remedy, as generally ineffective and, indeed, a costs' order against unsuccessful litigant is not, in itself, considered against to the Convention.¹⁸⁰

Whatever view we hold on abortion¹⁸¹, we can all agree that, in an ideal world, abortions would not exist – not because they would be illegal and banned, but because they would be unnecessary given that, in most cases, they are avoidable. The aim should thus be to avoid as many abortions as possible.¹⁸² A WHO report on “Preventing HIV/Aids in young people” revealed that education about HIV tended to delay sexual activity, and that sex education did not increase sexual activity. These results can be transposed to unwanted pregnancies.¹⁸³

¹⁷⁹ Abortion is clearly an economic decision as well, and not solely a moral one; therefore, it should be understood within the context of economic inequalities, not simply through arguments about rights. Reproductive and children's rights correlate highly: nations with the most liberal abortion laws also provide the most extensive child welfare systems. In contrast, many nations with restrictive abortion laws have high infant mortality and illiteracy. As a Central American feminist, Luz Marina Torres, puts it, “It is a sin to bear an unwanted child and watch it starve to death”. Freedman, 2002, p. 242.

¹⁸⁰ See the Case *D. v. Ireland*, paragraph 100.

¹⁸¹ Those who are more interested in philosophical aspects of abortion may see Cohen, Nagel, and Scanlon (ed.), *The Rights and Wrongs of Abortion. A Philosophy & Public Affairs Reader*.

¹⁸² On the grounds of child welfare, pro-choice and pro-life women sometimes reach across the political divide. Both groups would like to minimise the need for abortion, though social conservatives stress abstinence and paternal authority while liberals favour sex education and affordable child care. In Austria, a Catholic lay organisation dropped its opposition to liberalising abortion laws and began to work for both public awareness of pregnant women's choices and social support for motherhood. Danish feminists who support women's right to choose have tried to lower the incidence of abortion by improving women's access to jobs, housing and contraception. Freedman, 2002, p. 243.

¹⁸³ Doc. 11537 rev. Report on the Access to Safe and Legal Abortion in Europe by the Committee on Equal Opportunities for Women and Men, Parliamentary Assembly, Council of Europe, p. 5. The Speech of Ms. Katarina Lindahl, Secretary General of “RFSU” (The Swedish Association for Sexuality Education), AS/Ega (2007) PV 3 addendum, pp. 11-12.

3.5. On Citizenship

In this study I have treated the concept of citizenship in the light of critical feminist research. By this I mean that citizenship is a capacity to act as a recognised person with all relevant rights needed to lead one's life as a dignified human being and autonomous actor in the given society. Rights are often seen as fundamental to citizenship. In every citizenship vocabulary the status of citizenship gives citizens access to important rights. Human rights may be defined in international resolutions, but citizenship rights are those rights which a particular state guarantees its citizens by law. Citizenship rights are thus concrete, specific, legal and can be claimed in the court.¹⁸⁴

I have to agree strongly with Rachel Alsop and Jennifer Hockey who see that underpinning the issue of women's reproductive autonomy and the role of the Church and the State¹⁸⁵ in regulating women's access to reproductive services there is an ideology of female domesticity.¹⁸⁶ Some women, with little skills, who are thus ill-prepared to compete with the more appropriately trained men, choose motherhood as their single social role and aspire to justify their joblessness as a patriotic or moral duty.¹⁸⁷ In Ireland this "cult of domesticity" has even threatened to undermine economic expansion and the "Celtic Tiger" project. The government even introduced tax incentives to encourage women to return to paid employment. This challenge to the traditional gendered division of labour met with opposition from the "old allies" to criticise working women. Catholic rightwing groups pointed to the constitutional commitment to recognising and protecting women's lives within the home. Portrayed as an attack on the family, a devaluation of women's work within the home and possibly unconstitutional, the tax individualisation plan was withdrawn. However, the debate has not ended. Incentives to encourage greater female participation in the labour force have been given added momentum by European Union membership and Community strategies to promote gender equality. The European Community framework strategy on gender equality (2001-2005)¹⁸⁸, seeks to promote gender equality in economic life and a change in gender

¹⁸⁴ Voet, R., 1998, p. 60.

¹⁸⁵ Bracewell argues convincingly that nationalistic debate about the role of women and mothers is a ritual carried out in the political sphere largely by men for other men. Alsop and Hockey, 2001, p. 457.

¹⁸⁶ A commitment to the ideal of "separate spheres", premised on the complementarity of gender roles and a presumption of natural sex differences between women and men, is central to Roman Catholic teaching. Women are seen mainly as mothers and caregivers. Mullally, 2005, pp. 83 and 93.

¹⁸⁷ Alsop and Hockey, 2001, p. 462.

¹⁸⁸ The Irish government issued Ireland's Reform Programme in 2005. The programme outlined the supports and measures the Irish government intended to put into place to increase women's employment and to further eliminate gender gaps. The Equality for Women Measure, and the Childcare Investment Programme (Equal Opportunities Childcare Programme 2000-2006 and the National Childcare Investment Programme 2006-2010) are the measures to

roles and stereotypes. As a strategy, it conflicts directly with the Christian right wing's concern to protect women's roles within the home and Ireland's inherited tradition of gender-differentiated citizenship.¹⁸⁹

Whereas a lesbian woman wanting to become a parent is in the opinion of the state suitable to take care of other people's children but not of her own, Ms. D. on her turn is not worthy of enjoying new fertility technologies no matter how much she would be willing to pay in order to have a biological child.¹⁹⁰ It seems that if a woman does not have a solid base for the citizenship and she falls outside the normative category of citizenship which combines ideals of a nuclear family and heterosexuality, she will also face problems in claiming her rights to become a mother/parent or have a family. The case of *Evans v. the United Kingdom* indicates that if the equal rights of a man and a woman are in conflict, a man's position as a citizen is more protected and his rights overrule the rights of a female citizen.

Male sperm is not only associated with reproduction, but also with power, resources and continuity of the family name.¹⁹¹ Children in and out of wedlock have been treated differently under legal systems until quite recently.¹⁹² The (male) children were recognised as bearers of the property rights of their fathers, whereas Victorian married women were denied legal subjectivity

reach these goals. Making the European Union Relevant for Women published by the National Forum on Europe, 2007, p. 10.

¹⁸⁹ In 1971, 60% of Irish women aged fifteen years and over were engaged in full-time "home duties" In 1991, this had fallen to just under 50%. In 1970, women accounted for 28% of the labour force. In 1991, this had risen to just 32%. Following the rapid expansion of the Irish economy in the 1990s, this figure was approximately 46%. According to a gender report Women and Men in Ireland the figure had risen to 60,3% in 2007, slightly below the EU average. A report available at www.finfacts.com. (Consulted on 5 June 2008). Article 41.2.2 the Irish Constitution leaves little room for debate as to the nature of women's citizenship: "The State shall endeavour to ensure, that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home." Mullally, 2005, pp. 83, see note 53. The *Baby O* case proves the narrative of a nation of being highly exclusive. The case involved a Nigerian woman, seven months pregnant and subject to a deportation order from Ireland, following a failed application for asylum. Taking judicial review proceedings challenging the validity of the deportation order, she argued that the duty to defend and vindicate the unborn baby's right to life prevented the state from deporting her to Nigeria, where infant mortality rates were substantially higher and the standard of living, substantially lower. The state's duty to defend and vindicate the right to life of the unborn did not extend to ensuring the health and well-being of *Baby O*, or even to ensure a safe delivery. Article 40.3.3. could not be relied on to invoke unenumerated social and economic rights which the Court held were not implicit within the constitutionally protected right to life. The Court upheld the deportation order and also refused a final application to stay the order pending an appeal to the European Court of Human Rights. If *Baby O* had been born in Ireland, she could have claimed Irish citizenship. The "common good" required a speedy deportation of the mother and foetus. Mullally, 2005, pp. 91-92.

¹⁹⁰ Some scholars have suggested that Article 15(1)(b) of the ICESCR, which establishes the right to everybody to "enjoy the benefits of scientific progress and its applications" in combination with Article 12 (right to health), could be invoked as comprising states obligations to promote assisted procreation. Also the World Conference on Human Rights, held in Vienna 1993, emphasised that everyone had the right to enjoy the benefits of scientific progress and its applications. Eriksson, 2000, p. 195.

¹⁹¹ For more information see for instance Engels, *The Origin of the Family, Private Property and the State*.

¹⁹² See the Case *Marckx v. Belgium* no. 6833/74, on 13 June 1979, A31.

and equal rights. Under the common law doctrine, a woman's legal personality became that of her husband's on marriage. A wife's interests were presumed to be that of her husband. There could be no conflict of interests if there was no distinction between the interests in the first place.¹⁹³ These historical facts might provide some account to the present gendered legal subjectivity as well.

Most probably the realisation that social changes have occurred in matters of family life has led to a new formulation of family-related principles in the European Union Charter of Fundamental Rights¹⁹⁴ which makes no reference to "men and women" in this context, and formally separates "the right to marry" and "the right to found a family"¹⁹⁵. This separation is probably a consequence of the rise in the number of countries that have adopted registered partnership legislation or other similar legal arrangements.¹⁹⁶ Reluctance to address these topics at the national level greatly limits progress at the international level as well.¹⁹⁷ However, issues arising around race, ethnicity, religion, gender and sexual orientation are equally simple or complex; equally rational or irrational; equally well or ill-suited to legal regulations; equally contingent upon, or independent of, moral and religious concerns. Their complexity has only been used as a pretext for maintaining women's reproductive rights and sexual orientation in a permanent state of moral-dilemma-beyond-law.¹⁹⁸

New reproductive technologies have transformed the reproductive process by giving women freedom to choose motherhood when and how they prefer. It has been faced by fear in many societies, seeing it as taking away the last powerful function of the heterosexual, i.e., the biological family.¹⁹⁹ This turn has not only liberated women from their biological destiny but it has changed sex into plastic sexuality – sexuality freed from its intrinsic relation to reproduction.²⁰⁰ As anatomy

¹⁹³ Fletcher, 2003, p. 227.

¹⁹⁴ Available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf. (Consulted on 29 April 2008).

¹⁹⁵ However, the right to marry and right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights. Article 9.

¹⁹⁶ In the Directive 2004/38/EC on the right of the EU citizens and their family members to move and reside freely within the territory of the Member States the definition of "family members" covers for the first time registered partnership under the legislation of a Member State; if the legislation of the host Member State treats registered partnership as equivalent to marriage. Available at www.europa.eu. (Consulted on 10 June 2008)

¹⁹⁷ Grigolo, 2003, pp. 1043-1044.

¹⁹⁸ Heinze in Cook and Ulrich (eds.), 2002, p. 226.

¹⁹⁹ Fletcher, 2003, p. 233.

²⁰⁰ O'Brien identifies the development of contraceptive technology as a key moment in the dialectical development of reproduction. This development has enabled a woman to exercise a greater degree of rational control over the process of reproduction. By consuming contraceptives, she could break the link between heterosex and reproduction; she could avoid pregnancy by changing her hormonal patterns. Some women experienced this development as sexual liberation since reproductive risks could be minimised. Others experienced it as sexual oppression when their sexual availability was assumed. Fletcher, 2006, p. 40.

stops being destiny, sexual identity also becomes more and more only a life-style issue.²⁰¹ Anthony Giddens foresees that this process will democratise the whole private domain, in a manner fully compatible with democracy in the public sphere.²⁰²

However, this democratisation of the private domain has not yet been completely reflected in the public sphere, i.e., into the legislation. Law is important since it brings legal subjects into being by making reproduction their object of control. This legal subjectivity itself has two dominant forms of expression: one which has a responsibility to reproduce, and one which has a responsibility not to reproduce. The shaping of reproductive subjectivity by legislation is a contradictory process as its general application to the population at large is contradicted by particular concerns about the reproductive responsibilities of specific groups of people. As the rational control of reproduction intensifies through technological and medical development, the biological reproductive process becomes more objectified and liable to the exercise of rights. The intensification of this control is negotiated through qualifying reproductive responsibilities. Rather than having a general responsibility to reproduce, one acquires a responsibility to reproduce in a certain way, at a certain time and in certain circumstances. Legal form installs rational control over the biological process of reproduction of the legal subjects.²⁰³

CHAPTER 4

TOWARDS GREATER AUTONOMY AND DIVERSITY IN EUROPE

The Committee of Ministers of the Council of Europe stressed, in October 1987, that “human rights and fundamental liberties flow from the recognition of the inherent dignity of human kind”.²⁰⁴ This

²⁰¹ Giddens, 1992, pp. 199. A little bit more critical approach to sexuality in modern societies can be found by Evans in *Sexual Citizenship, The Material Construction of Sexualities*, 1993.

²⁰² Giddens, 1992, pp. 199.

²⁰³ Fletcher, 2003, pp. 236-237.

²⁰⁴ See Eriksson, 2000, p. 304. Rights are fundamental, they are human rights, when they are so crucial to human life or dignity as to be deemed “inherent” to the human being. Heinze, 1995, p. 142. If there is any difference between fundamental rights and ordinary rights, it is that the fundamental rights of some may not be denied simply because others deem their exercise sinful, immoral, or distasteful. *Ibidem*, p. 189. The essential question here is whether moral preferences, even those that are deeply held, long standing, and sincerely shared by a majority of citizens, suffice to curtail fundamental rights. Specific morality alone, absent palpable harm, does not suffice to deny a fundamental-inviolable and inalienable – right. *Ibidem*, p. 192. As in the *Dudgeon Case*, the Court examined the balance between morals and rights. Recognising the margin of appreciation the Court accorded to each member States to regulate its own

basic value of human dignity is giving the whole legitimacy to the international human rights legal system. Human dignity has implications for how human beings ought to be treated. Closely linked with human dignity is control over reproduction and sexuality, which has been considered as an essential element of it.

The principle of the dignity of a person, as understood in contemporary human rights law, enables individuals to realise a chosen life plan, i.e., to be free to make decisions about one's reproductive destiny without coercion from the government or outside factors. A human being is seen as intelligent; one is, after all, free to exercise one's own intellect to decide on matters relating to one's development, in particular one's own reproduction.²⁰⁵ These special characteristics of the human being are inextricably related to the concept of human dignity. Seen in this context it is not national or moral objectives but women's health and reproductive autonomy that should be the major concern.

The principle of human dignity is closely related to the idea of autonomy²⁰⁶, which is closely linked with various aspirations of modern democracy. Autonomy means the capacity of individuals to be self-reflective and self-determining: "to deliberate, judge, choose and act upon different possible courses of action".²⁰⁷ Individuals should be free and equal in the determination of the conditions of their own lives; that is, they should enjoy equal rights (and accordingly, equal obligations) in the specification of the framework which generates and limits the opportunities available to them, so long as they do not deploy this framework to negate the rights of others. The authority of the state is justifiable to the degree that it recognises the principle of autonomy; in other words, to the extent to which defensible reasons can be given as to why compliance enhances autonomy, either now or in the future.²⁰⁸ The principle of autonomy encourages difference.

moral climate, the majority nevertheless maintained, that moral regulation may abridge a fundamental right only when the necessity of so doing fulfils a pressing social need. This standard is consistent with the "palpable harm" rule, if not stricter. *Ibidem*, p. 196. Whenever other arguments run out, omens of "outcry" and "turmoil" based on "centuries' old beliefs, are invoked by the opponents of the fundamental rights. It is an age-old tactic, used in denial of the most fundamental rights, from suppression of alternative political or religious viewpoints, to slavery and racial discrimination, to subjugation of women. *Ibidem*, p. 199.

²⁰⁵ Packer, 1998, p. 84.

²⁰⁶ Self-trust is integral to the development of one's autonomy. It reinforces one's ability to make decisions. For those faced with oppressive life circumstances, however, self-trust is often diminished. Recognising the relational nature of women's lives is therefore imperative. Tachuk, 2007, p. 51.

²⁰⁷ Volio: "Alone or in the company of close ones, an individual acts according to his feelings, his will, and personality. In this situation we see man in his solitary nature; as an independent subject, he may decide how to utilise his autonomy to make his ontological liberty authentic and meaningful..." Denial of personal privacy is tantamount to a denial of citizenship and of human dignity. Heinze, 1995, pp. 171 and 174.

²⁰⁸ Giddens, 1992, pp. 185-186. The essence of each of the restrictions is that the interests of society as a whole override the interests of the individual. However, the difficulty of the Court is determining whether the interference will go

Democracy is an enemy of privilege, where privilege is defined as the holding of rights or possessions to which access is not fair and equal for all members of the community.²⁰⁹

Therefore, seemingly gender-neutral policies need to be drastically altered in order to do justice to women. There is a need to break away from the dichotomous positioning of the equality-difference debate and explore in which way we can recognise and use the notions of sexual difference and yet make arguments about equality. It is also important to shape the politics of equality of women and men without disregarding the differences that exist between and among women and men.²¹⁰ It requires courts to interpret laws so as *actually to produce* social equality.²¹¹ The Court reiterates that the advancement of the equality of the sexes today is a major goal in the member states of the Council of Europe and there is little room for margin of appreciation where discrimination is based on sex.²¹² If reproductive control is seen as a sex equality issue, deprivation of reproductive autonomy is a sex equality violation, and prohibitions on abortion must sustain sex equality scrutiny or to be found illegal under existing constitutions and international conventions.²¹³

beyond what is necessary in a democratic society. In deciding, whether action is necessary in a democratic society, the notion of the state's margin of appreciation has arisen and can often be troublesome. To what extent should the Court defer to the state's interpretation of the situation it faces in allowing a limitation on the rights guaranteed by the Convention? The Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention; the phrase "necessary in a democratic society" means that, to be compatible with the Convention, the interference must, *inter alia*, correspond to a "pressing social need" and the "proportionate to the legitimate aim pursued". The Court's supervisory function obliges it to pay the utmost attention to the principle characterising a "democratic society". Surprisingly, the Court has not discussed in detail the qualities of a democratic society, but it is clear that they regard the qualities of pluralism, tolerance, broad-mindedness, equality, liberty, and encouraging self-fulfillment as important ingredients of any democracy. The scope of the margin of appreciation will sometimes be broad and sometimes narrow depending on the nature of the rights in issue, or on the balancing of competing rights. In areas of morality, the scope of the margin is likely to be wide, since there is among the Contracting States no uniform conception of morals. Jacobs and White, 1996, pp. 304-305 and 307-308.

²⁰⁹ Giddens, 1992, p. 188.

²¹⁰ It should not deny the existence of gender difference, but it does not suggest that its meaning are always relative to particular constructions in particular context...equality requires the recognition and inclusion of differences. van Eerdewijk, 2001, p. 425. The fact that men and women really are different – and this is indeed a fact – does not mean that the division of human beings into two, and only two, categories is compelled by biology. That division is social and sometimes legal. It might be equally right to think that differences are an outcome of inequality, or its product. Certainly some and perhaps many of the "real differences" between men and women exist only because of sex inequality. Sustein, 1995, pp. 346-347. The controlling principle, to be vindicated through law, is not that women must be treated "the same" as men, but that women must not be second-class citizens. *Ibidem*, p. 348.

²¹¹ MacKinnon, 2005, p. 55.

²¹² Jacobs and White, 1996, pp. 291 and 293. There are two kinds of equality in human rights law. There is a general, ideal equality, according to which all people, merely as people, are entitled to enjoy all fundamental rights equally. There is, however, also a specific equality which recognises the historical failure of that ideal with respect to particular categories of persons, like women and gays. The purpose of the affirmative action is to emphasise that historical failure with respect to those categories and to link the abstract idea of equality to historical reality. Heinze, 1995, pp. 220-221.

²¹³ Deprivation of reproductive autonomy is arguably central to the ways in which women, as a group, have been historically disadvantaged. In this light, laws of abortion and reproductive health are equality laws in disguise. MacKinnon, 2005, p. 56.

However, the EU Network of Independent Experts on Fundamental Rights stated in its report as follows:

“While acknowledging that there is yet no settled case-law in international or European human rights law concerning where the adequate balance must be struck between the right of the woman to interrupt her pregnancy on the one hand, as a particular manifestation of the general right to the autonomy of the person underlying the right to respect for private life, and the protection of the potentiality of human life on the other hand, the Network nevertheless expresses its concern at a number of situations which, in the view of the independent experts, are questionable in the present state of the international law of human rights”.

“A woman seeking abortion should not be obliged to travel abroad to obtain it, because of a lack of available services in her home country even where it would be legal for her to seek abortion, or because, although legal when performed abroad, abortion in identical circumstances is prohibited in the country of residence. This may be a source of discrimination between women who may travel abroad and those who, because of a disability, their state of health, a lack of resources, their administrative situation, or even the lack of adequate information may not do so.”²¹⁴

²¹⁴ Paragraph 52. Originally in the report “The Conclusions and Recommendations on the Situation of Fundamental Rights in European Union and its Member States in 2004” dated 15 April 2005. The Former Commission has stated that placing a higher value on the “unborn life of the foetus” than on the life of a pregnant woman would be contrary to the object and purpose of the Convention. *Case X v. the United Kingdom* no. 8416/79, on 13 May 1980. The Commission supported this interpretation of the right to life, as protected under article 2 of the Convention, by pointing out that most of the Contracting States allowed abortions when necessary to save the mother’s life. As long as a couple has been able to make a choice without coercion (whether on the part of the State or any private party) and has adequate access to information and means to realise that choice, the State has fulfilled its obligations relating to the right to reproductive choice. Ultimately, the way in which couples arrive at their choice and act upon it remains a matter in the private realm. First and foremost, reproductive choices should be made and resolved by the couple itself. But where differences in desires lead one member of the couple to seek help against the possible or existing violation of his or her right, the State, owing to its obligations under international human rights law, is required to offer assistance and proceed to resolution bearing in mind the rights of both members. However, in the process of resolving the conflicting desires, different weight may – and should – be accorded to the claims on the basis of objective assessments of burdens and effects. Particularly, any risks to the physical and mental health of the woman must have determinative value. Packer, 1998, p. 94-95.

As the Parliamentary Assembly of the Council of Europe states: in many of the member states, numerous conditions are imposed to restrict the effective access to safe abortion.²¹⁵ These restrictions have discriminatory effects, since women who are well-informed and possess adequate financial means can often obtain legal and safe abortions more easily. The Parliamentary Assembly reaffirms that abortion can in no circumstances be regarded as a family planning method. Abortion must, as far as possible, be avoided. All possible means compatible with women's rights must be used to reduce the number of both unwanted pregnancies and abortions. However, in member states where abortion is legal, conditions are not always such as to guarantee women effective access to this right.²¹⁶

According to the European Parliamentary Forum on Population and Development, the estimated number of unsafe abortions in Europe varies from 500,000 to 800,000 annually. According to the statistics of the Irish Family Planning Association, in the year 2006, 5042 Irish women went to Britain for an abortion. In Poland, where underground private abortion services are robust, as is "abortion tourism", women travel to neighbouring countries, including Austria, Belarus, Belgium, the Czech Republic, Germany, Lithuania, the Netherlands, the Russian Federation, Slovakia and Ukraine, to have an abortion. Laws banning abortion expose women – not men – to increased health risks and therefore have a discriminatory effect. The laws are discriminatory also in that they "both denigrate and undermine women's capacity to make responsible decisions about their lives and their bodies".²¹⁷

The bottom-line question might be to what extent pluralistic modern democratic societies must tolerate intolerance.²¹⁸ I would assume that this is exactly the point on which the Court tries to set boundaries. The Court itself has stated that if human rights are indeed fundamental rights, they must, barring "absolute necessity," supersede even profound moral and religious convictions. "The (t)wo hallmarks" of a democratic society, the Court added, are "tolerance and

²¹⁵ Doc. 11537 rev. Report on the Access to Safe and Legal Abortion in Europe by the Committee on Equal Opportunities for Women and Men, Parliamentary Assembly, Council of Europe, p. 1.

²¹⁶ *Ibidem*.

²¹⁷ Doc. 11537 rev. Report on the Access to Safe and Legal Abortion in Europe by the Committee on Equal Opportunities for Women and Men, Parliamentary Assembly, Council of Europe, p. 4. See the speech of Ms. Anne Quesney, Director of "Abortion Rights", United Kingdom, AS/Ega (2007) PV 3 addendum, pp. 6-7.

²¹⁸ Human rights law refuses hegemony. It rejects the general meddling in the domestic, everyday affairs of States, instead interceding only in the event of specific violations of fundamental rights. It presupposes a principle of subsidiarity: the irreducible authority of the individual state to determine its own destiny in meaningful ways. Heinze, 1995, p. 236. However, the CEDAW Committee has, in recent years, adopted a strong universalistic stance towards women's human rights, rejecting appeals to religious-cultural beliefs that seek to justify inequalities in domestic law and practice. Mullally, 2007, p. 267.

broadmindedness”.²¹⁹ However, according to its own advocacy of individual and cultural diversity, according to its proclaimed rights to religious and philosophical freedom, human rights law must respect the right of such opponents to hold their own views. Yet that right, too, is not absolute, and may not be imposed on others outside of such belief systems. The right to exercise religious or other beliefs stops where the community of believers stops, and may not be imposed on others without consent, no matter how painful or frightening that limitation might feel for believers.²²⁰

All in all, it seems that the Convention and the Court despite their obvious shortcomings are playing an important role in securing the minimum standard of protection of human rights in Europe. The European Union treaty makes express reference to the Convention as the basis for human rights protection within the European Union.²²¹ The amendment of Protocol No. 11 has made the remedy of individual application compulsory for all parties to the Convention. One can say without much exaggeration that the Court has become akin to a constitutional court of Europe. Regarding the majority of the traditional Western group of members of the Council of Europe, the Court succeeded in having its jurisprudence prevail over national laws and practices that were contrary to the Convention. The difficulties in overcoming pre-modern trends in some Western European states and the remnants of authoritarian thinking prevailing in former socialist states in Eastern Europe are setting a serious challenge in front of the Court.²²² In 2007 it was reported that the Court received 41,700 complaints.²²³ If states complied with their duty to respect and ensure the rights set forth in the Convention, there would be little left that the Court would have to remedy.

²¹⁹ Case *Young, James and Webster v. the United Kingdom* no. 7601/76; 7806/77 on 13 August 1981, A44.

²²⁰ Heinze, 1995, p. 210. It should be understood that the religious conscientious objection principle is a right provided by the pluralistic democratic society for individual persons, not for such organisations as hospitals, as it has been misinterpreted for instance in Poland. However, it cannot be excluded in principle that certain religious organisations be recognised a right not to perform certain activities, where this would conflict with the ethos or belief on which they are founded. But reference in this context to “religious conscientious objection” may be inappropriate, as this right is generally considered a right of the individual rather than of an organisation. However, it is important that the exercise of this right does not conflict with the rights of others, including the rights of all women to receive medical services or counselling without any discrimination. It is clear that churches and religious organisations may invoke Articles 9 and 10 of the Convention, which guarantee freedom of religion and freedom of expression, independently of the individual rights of their members. E.U. Network of Independent Experts on Fundamental Rights Opinion No. 4-2005: The Right to Conscientious Objection and the Conclusion by EU Member States of Concordats with the Holy See, 14 December 2005, p. 30.

²²¹ Jacobs and White, 1996, p. 403.

²²² Tomuschat, 2003, pp. 198-199.

²²³ Annual statistics on the cases of the ECHR are available at <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+information+by+year/>. (Consulted on 12 May 2008).

There are increasing hopes that reproductive autonomy will be granted to all women in Europe since The Council of Europe started to pressure the Member States to legalise abortion. The Parliamentary Assembly passed a resolution on 8 April 2008 calling for all of its member states to legalise abortion. It is the first time that a European institution has written an official text calling for the de-criminalisation of abortion. The Council's report states, "A ban on abortions does not result in fewer abortions, but mainly leads to clandestine abortions, which are more traumatic and more dangerous. The lawfulness of abortion does not have an effect on a woman's need for an abortion, but only on her access to a safe abortion."²²⁴ The Parliamentary Assembly's resolution is not legally binding but is a positive step for abortion rights activists. As the Assembly affirms the right of all human beings, women included, to respect for their physical integrity and to freedom to control their own bodies. In this context, the ultimate decision on whether or not to have an abortion should be a matter for the woman concerned, and she should have the means of exercising this right in an effective way.²²⁵ It should not be the government's role to take decisions in her stead. Abortion on request is, in theory, available in all Council of Europe member states, except Andorra, Ireland, Malta, Monaco and Poland.²²⁶

CONCLUSION

As I described in the introduction, citizenship forms that autonomous space in society which allows a person to lead her life as she wishes. It includes the freedom to decide whether to become a parent and some controls over the means by which one becomes a parent. The case-law of the European Court of Human Rights shows that this autonomy is not limitless but constantly negotiated and contested by different forces prevailing in society. The most important is the state which is seen as representing the general interests and values of the society, which, in turn, receive their expressions in the legislation. The legislation defines the line between "good" and "bad" reproducers and allows

²²⁴ Doc. 11537 rev. Report on the Access to Safe and Legal Abortion in Europe by the Committee on Equal Opportunities for Women and Men, Parliamentary Assembly, Council of Europe, p. 1.

²²⁵ *Ibidem*, p. 2.

²²⁶ *Ibidem*, p. 3. Finnish Parliamentarian Minna Sirniö (The Left Alliance) has complained that it is very difficult to get through any statements in the development policy of the Commission or the European Parliament which were related to the improvements of sexual health, family planning or women's reproductive autonomy. These topics are avoided due to the opposition of Malta and Poland. "The EU is hushing in order not to rock the boat" Also Government's Special Adviser on Health Affairs Gisela Blumenthal agrees with Ms. Sirniö. "The language is now much more careful for instance related to abortion", she says. The article, "Every Minute a Woman Dies because of Pregnancy or Delivery" and the article "The New EU Countries are Slowing Down the Improvements of the Women's Sexual Health" in Helsingin Sanomat on 21 April 2008.

the judiciary to give, or deny the full rights of citizenship from those deemed to be, respectively, worthy or unworthy of parenthood.

In the case of *Evans v. the United Kingdom*, it can be seen that the Court had extreme difficulty in reaching a verdict because the interests of the two sides were completely irreconcilable; if the applicant had been permitted to use the embryos, J would have been forced to become a father against his will, whereas, if J's refusal or withdrawal of consent had been upheld, the applicant would have been denied the opportunity to become a genetic parent. The interests of one of the parties would have been denied whatever the Court had decided. The Court had problems finding a reasonable position to take in the matters of artificial insemination which had surprising social consequences as it can be seen in this case. After all, the Court concluded that the principal issue in the case was whether the legislative provisions applied in the case struck a fair balance between the competing public and private interests involved. By emphasising the importance of legal certainty and avoidance of problems of arbitrariness and inconsistency the Court saved itself from a highly difficult task of balancing the conflicting rights of the applicant and J.

The case ended up becoming an abstract problem in relating the supranational jurisprudence and domestic legislation, since the Court was reluctant to touch upon the actual and sensitive conflicting rights and interests of the parties to the case. Actually, the verdict, that refused Ms. Evans' wish to have a biologically related child was completely against the ideals of artificial insemination treatment since the main aim of this treatment is to help people to have children if they are lacking this capacity for one reason or another. Four judges ended up concluding that the best comparison to Ms. Evans' predicament would be to the situation of an infertile man. They believed that the proper way to approach the case would have been to recognise the fact that different situations require different treatment. According to them a woman is in a different situation to that of a man as concerns the birth of a child. There would be no other way for a woman in Ms. Evans' position to secure her future prospects of bearing a genetically related child. These judges thought that the 1990 British Act did not provide for the possibility of taking into consideration the very special medical condition of the applicant on the grounds that it provides too much certainty and no flexibility at all. They continued that this case was not only about general policy, it was most of all a case about important individual interests. They believed that the case must be seen beyond the mere question of consent in a contractual sense. The values involved and issues at stake as far as the applicant's situation was concerned weighed heavily against the formal contractual approach taken

in the case. The judges considered that the relevant domestic legislation had not struck a fair balance in the special circumstances of the case.

The case of *E.B. v. France* was very interesting since French legislation expressly grants single persons the right to apply for authorisation to adopt without discrimination based on applicant's sexual orientation. Therefore, I find the questions about the lack of a paternal influence and doubts about the applicant's choice of lifestyle as a lesbian mere indications of homophobic attitudes of the French domestic authorities. Since discrimination based on sexual orientation is forbidden both in the EU and in the Council of Europe, these attitudes are simply turned into new discourses on the best interests and needs of a child. I have to admit that I am stunned by the remarks made by the psychologist who wondered whether the applicant was trying to avoid the "violence" of giving birth and genetic anxiety regarding a biological child by seeking an adoption. How can one measure the "violence" of giving birth if a man wants to become a parent? If we follow this logic, men should be denied parenthood completely if having a child is legitimised only by the pain that is related to giving birth. The same psychologist also stated that the applicant had unusual attitude towards men – she rejected them entirely.

The Court justly ruled that the applicant had suffered a difference in treatment. If the reasons behind such a difference in treatment were based solely on considerations regarding the applicant's sexual orientation, this amounted to discrimination under the Convention. French law precisely allows single persons to adopt, thereby opening up the possibility of adoption by a single homosexual person. Furthermore, the Civil Code remains silent as to the necessity of a referent of the other sex and, moreover, the applicant presented undoubted personal qualities and an aptitude for bringing up children.

The cases of *D. v. Ireland* and *Tysiaç v. Poland* were both about the right not to have a child, i.e., women's right to contraception and (in these cases) abortion. However, the case of *D. v. Ireland* was declared inadmissible by the Court on the grounds that the applicant had not complied with the requirement that she exhaust all possibilities available under Irish law to be granted an abortion in the case of fatal foetal abnormality. The applicant confirmed that the idea of legal action had never entered her mind at the time of her diagnosis; she was pregnant with twins one of which was dead, while the other had abnormalities that would have proved fatal. The applicant further argued that a number of obstacles stood in the way of her exhausting the constitutional remedy proposed by the Government. She considered that her case had no prospects of success. In the light

of other Irish cases, before and after, I share the serious doubts that the applicant had about the success of her legal case. But obviously the Court had greater faith in the proper functioning of the Irish legal system than the Polish one.

In the case of *Tysiąc v. Poland* the applicant was refused access to legal abortion based on therapeutic grounds, but was refused despite the fact that the procedure is legal in Poland in such circumstances. Following the delivery, the applicant's eyesight deteriorated considerably so that she is in constant need of daily assistance. The Court concluded that the Polish legal system did not provide any particular procedural framework to address and resolve the disagreement as to the advisability of therapeutic abortion, either between the pregnant woman and her doctors, or between the doctors themselves. The Court therefore concluded that the Polish law, applied to the applicant's case, did not contain any effective mechanism capable of determining whether the conditions of obtaining a lawful abortion had been met. However, it seemed that there is no general agreement amongst the doctors as to what exactly constitutes a threat to a woman's health or life. It appeared that some physicians do not take into account any threat to a woman's health as long as she is likely to survive the delivery of a child. In practice, abortions on social grounds have not vanished from Ireland or Poland, but instead they are simply pushed underground or they take place abroad. The effects of the strict abortion laws are felt primarily by the poorest and least educated members of society as illegal abortions or those conducted abroad are expensive.

I believe that my analysis of the case-law demonstrates well the pre-conditionality of reproductive autonomy for women's full citizenship but, on the other hand, I have found that reproductive autonomy constitutes itself at the same time within this legal discourse. There is a mutual dependency between reproductive autonomy and citizenship. Once women's reproductive autonomy is violated, they also will face problems claiming their full rights of citizenship, and if women are treated as second-class citizens, usually their reproductive autonomy is very limited and out of their control.

Women's reproductive autonomy is often restricted in situations where the authoritarian officials simply interpret the laws against the spirit of the democratic principles and the best interest of the woman in question. I would argue that the denial of a woman's reproductive autonomy is the same as the denial of one's intellectual and social autonomy or political subjectivity, i.e., a complete nullification of her citizenship. If a woman does not even have control over her own body and private relations, how can she possibly act in a society as a citizen with all

the related rights and duties? Without this autonomy, she will remain always a second-class citizen of her society, unable to struggle for her emancipation and empowerment either in private or public.

It would seem that, legally, women in Europe have a wider autonomy regarding the termination of pregnancy than in respect to artificial insemination and the use of their own genetic material. However, there is a material difference in men's and women's role in reproduction which ought to be recognised also in legislation. Egg donation, gestation and birth connect women to the process of reproduction in a more intimate and sustained fashion than sperm donation connects men. Infertility treatment is very painful and can even be physically dangerous, and pregnancy is open to many different kinds of complications. Pregnancy and child-caring leaves women open to many social and economic implications, which can be seen in women's less-favourable labour market position with lower salaries and stagnant career prospects compared to their male colleagues. This is not the same as saying that men and women's emotional connections to reproduction are necessarily different.

I would further argue that without reproductive autonomy women are not allowed to lead dignified and decent lives inherent to all human beings. Without this autonomy women will remain a group that has less freedom than men although they live in the same society. In a democratic state which promises all adults equal citizenship this ought to be unacceptable because it means that women are not equal citizens. Being a woman should not restrict one's freedom in a modern liberal democracy. Yet it still does. Restrictions on reproductive autonomy affect women especially; one might be relatively privileged in a society for instance as a qualified lawyer, but still be discriminated against as a woman being denied full reproductive rights. Denial of women's reproductive autonomy expels a whole category of people from useful participation in socio-economic life, and thus potentially subjecting them to severe material deprivation and even physical extermination. It marginalises women by making them dependent on the state authorities and other professionals who are in the position of being able to take control away from women themselves leading to a situation where women are in fact powerless, having no authority, status or sense of subjectivity over either their personal lives or public affairs.

As the Court has frequently pointed out, the Convention was designed to maintain and promote the ideals and values of a democratic society and it must be interpreted as a modern document that is responsive to the current European conditions and attitudes. The standards of the Convention reflect changes in social realities, and the Court's evolving theory of interpretation has

gradually placed greater emphasis on contemporary cultural and sociological notions such as gender equality and sexual orientation. The rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention. Compliance with requirements imposed by the rule of law presupposes that the rules of domestic law must provide a measure of legal protection against arbitrary interference by public authorities with the rights safeguarded by the Convention. It should be borne in mind that the Convention is intended to guarantee rights that are not only theoretical or illusory but rights that are practical and effective. An individual should have a chance to be involved in the decision-making process, seen as a whole, to a degree sufficient to provide her with the requisite protection of interests.

The Court has tried to balance the rights and interest of individuals and states by providing a minimum level of protection of rights and freedoms which is commonly accepted by the majority of the states in Europe. The entitlement claimed by society to indicate disapproval of certain social practices, like, for instance, homosexual acts, divorces or abortion cannot, in any event, constitute a reason for inequality of treatment, since the purpose of the Convention is to prevent the majority from taking away the rights of the individual. Democracy does not mean simply that the views of a majority must always prevail; a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position, i.e., the verdicts of the Court ought to serve the ends of maintaining and promoting the ideas and values of democratic society, which is based on tolerance, diversity and liberal values.

The Court has tried to find a balance between individual and state interests. There is also a delicate balance between national sovereignty and international obligations. In the case-law, studied in this thesis, one can clearly see conflicts between an individual citizen and more or less authoritarian states, which the Court, in its turn, tries to resolve. There is a clear tension between pre-modern authoritarian discourse which is challenging liberal democracy's concept of individuality causing legal conflicts between the states representing so called collective good and individual citizens who would like to lead their lives according to their own wishes and values in their specific life circumstances. However, de-traditionalization of family arrangements, scientific development, increased gender equality and different sexual choices and relations are creating new legal challenges to national legislation as well as to the Court. These changing social realities are challenging a hetero-normative concept of family life and the essentialist approach to gender relations, though the prevailing naturalist approach of many legal, public and medical experts is still causing unnecessary suffering and alienation for many individuals. The Court has been challenged

to resolve the question of to what extent pluralistic modern democratic societies must tolerate intolerance. The Court itself has stated that if human rights are indeed fundamental rights, they must supersede even profound moral and religious convictions. The two hallmarks of a democratic society are tolerance and broadmindedness and the right to exercise religious or other belief which, however, may not be imposed on others without their consent.

Reluctance to address topics related to women's reproductive rights and sexual orientation at the national level greatly limits progress at the international level as well. The complexity of these issues has been used as a pretext for maintaining women's reproductive rights and gays' rights in a permanent state of moral-dilemma-beyond-law. However, EU and CE legislation leave no room for discrimination based merely on sex or sexual orientation, and the Strasbourg Court reiterates that the advancement of equality between the sexes is a major goal in the member states of the Council of Europe and that there is little room for margin of appreciation where discrimination is based on sex. One may be hopeful that reproductive autonomy will be guaranteed for all women in Europe since the Council of Europe is pressuring the Member States to legalise abortion.

All in all, it seems that the Convention and the Court, despite their obvious shortcomings, are playing an important role in securing a minimum standard of protection of the rights of women in Europe. However, the realities of women's reproductive autonomy are still defined by individual states. If states complied with their duty to respect and ensure the rights set forth in the Convention, there would be little left for the Court to remedy. Personally, I do not see any other way out of this impasse than women's increased political participation especially at the national level, in making domestic legislations which greatly affects all the aspects of women's lives. If the national legislation is very conservative and strict regarding women's reproductive rights, there is not much to do to help these women in claiming their rights, since the appeals to the Court, even if successful, cannot force changes to national law. The Court's role can be seen as a harbinger of liberal progress preventing states with authoritarian tendencies falling back to the pre-modern stage. However, the Court will be able to process and provide remedy only for the most outrageous violations of the Convention. In order to end the culture of subordination and treatment of women as second-class citizens they must be educated about their human and fundamental rights and be encouraged to reclaim them.

Women's lives and politics are far too important to be left in the hands of men or states only. In this connection, I would like to make an extreme interdisciplinary reference to one of my favourite British pop groups, Bloc Party: "Is it so wrong to crave recognition? To want more than is given to you?"²²⁷

THE PRAYER

Lord, give me grace and dancing floor
And the power to impress
Lord, give me grace and dancing feet
Let me outshine them all
Is it so wrong to crave recognition?
Second best runner up
Is it so wrong to want rewarding?
To want more than is given to you?

Tonight make me unstoppable
And I will charm, I will slice, I will dazzle them with my wit
Tonight make me unstoppable
And I will charm, I will slice, I will dazzle, I will outshine them all

Standing on the packed dance floor
Our bodies throb in time
Silent on the weekdays
Tonight I claim what's mine
Is it so wrong to crave recognition?
Second best runner up
Is it so wrong to want rewarding?
To want more than is given to you?

By Bloc Party
A Weekend in the City

²²⁷ Bloc Party. A Weekend in the City, The Prayer. Published by the EMI Music Publishing.

BIBLIOGRAPHY

GENERAL WORKS AND E.MA THESES

- Polgári, E., *The European Consensus Analysis in the ECHR: Gay and Transsexual Rights Cases*, European Master's Degree in Human Rights and Democratisation, the Academic Year 2005/2006, The Danish Institute for Human Rights, Copenhagen, Denmark.
- Zidar, A., *The European Court of Human Rights and the Question of Remedies*, European Master's Degree in Human Rights and Democratisation, Awarded Thesis of the Academic Year 1998/1999, Venice, Marsilio Editori, 2001.

BOOKS AND MONOGRAPHS

- Cohen, M., Nagel, T., and Scanlon, T. (eds.), *The Rights and Wrongs of Abortion. A Philosophy & Public Affairs Reader*. Princeton University Press, 1974.
- Corea, G., *The Mother Machine : Reproductive Technologies from Artificial Insemination to Artificial Wombs*. New York, Harper & Row, 1985.
- Einhorn, B., *Cinderella Goes to Market: Citizenship, Gender and Women's Movement in East Central Europe*, London, Verso, 1993.
- Engels, F., *The Origin of the Family, Private Property and the State*. Penguin Classics, Middlesex, England, 1985.
- Eriksson, M. K., *Reproductive Rights in the Context of International Human Rights and Humanitarian Law*, The Hague, Martinus Nijhoff Publisher, 2000.
- Evans, David T., *Sexual Citizenship, The Material Construction of Sexualities*. London, Routledge, 1993.
- Freedman, E.B., *No Turning Back, The History of Feminism and the Future of Women*, New York, Ballantine Books, 2002.
- Giddens, A., *The Consequences of Modernity*, Polity Press, 1990.
- Giddens, A., *The Transformation of Intimacy. Sexuality, Love & Eroticism in Modern Societies*. Polity Press, 1992.
- Heinze, E., *Sexual Orientation: A Human Right. An Essay on International Human Rights Law*. Netherlands Martinus Nijhoff Publishers, 1995.
- Jacobs, F.G. and White, Robin C.A., *The European Convention on Human Rights*, Second Edition,

- New York, Clarendon Press, Oxford, 1996.
- Macdonald, R. St., *Margin of Appreciation*, Macdonald, R. St., Matscher, F., Petzold, H. (eds.), *The European System for the Protection of Human Rights*, Dordrecht, Martinus Nijhoff Publishers, 1993.
- McKinnon, Catharine A., *Women's Lives – Men's Laws*. Cambridge, The Belknap Press of Harvard University Press, 2005.
- Tomuschat, C., *Human Rights, Between Idealism and Realism*, Academy of European Law, European University Institute, New York, Oxford University Press, 2003.
- Voet, R., *Feminism and Citizenship*, London, SAGE Publications Ltd, 1998.
- Yourow, H.C., *The Margin of Appreciation in the Dynamics of European Human Rights Jurisprudence*, Dordrecht, Kluwer Law International, 1996.
- Žarkov, D., *The Body of War. Media, Ethnicity, and Gender in the Break-up of Yugoslavia*. Durham and London, Duke University Press, 2007.

ARTICLES, REPORTS AND STUDIES

- Alsop, R. and Hockey, J., “Women’s Reproductive Lives as a Symbolic Resource in Central and Eastern Europe”, pp. 454-471 in *European Journal of Women’s Studies*, SAGE Publications, vol. 8(4), 2001.
- Cook, R.J., “Compliance with Reproductive Rights”, pp. 229-256 in Hastrup, K. and Ulrich, G. (eds.), *Discrimination and Toleration, New Perspectives, International Studies in Human Rights*, Martinus Nijhoff Publishers, The Hague, 2002.
- E.U. Network of Independent Experts on Fundamental Rights Opinion No. 4-2005: *The Right to Conscientious Objection and the Conclusion by EU Member States of Concordats with the Holy See*, 14 December 2005.
- Fletcher, R., “Legal Forms and Reproductive Norms”, pp. 217-241 in *Social and Legal Studies*, SAGE Publications, vol. 12 (2), 2003.
- Fletcher, R., “Reproductive Consumption”, pp. 27-47 in *Feminist Theory*, SAGE Publications, 7; 27, 2006.
- Finley, L.M., “Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate”, pp. 190-207 in Weisberg, D.K., (ed.), *Feminist Legal Theory, Foundations*, Temple University Press, Philadelphia, 1993.
- Gager, Kristin E., “Women, Adoption, and Family Life in Early Modern Paris”, pp. 5-25 in

- Journal of Family History*, SAGE Publications, vol. 22, No. 1, 1997.
- Green, Steven C., "The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights", p. 19 in *Human Rights Files*, no. 17, Strasbourg, Council of Europe, 2000.
- Grigolo, M., "Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject", pp. 1020-1044 in *EJIL*, vol. 14, No. 5, 2003.
- Krieger, L.J., and Cooney, P.N., "The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality", pp. 156-179 in Weisberg, D.K., (ed.), *Feminist Legal Theory, Foundations*, Temple University Press, Philadelphia, 1993.
- "Making the European Union Relevant for Women", pp. 1-30 published by The National Forum on Europe. Published by Stationary Office, Ireland, May 2007.
- McBride, J., "Redress for Human Rights Violations" in G. Hand, J. McBride (eds.), *Droit sans frontières: Essay in Honour of L. Neville Brown*, Birmingham, Holdsworth Club, 1991.
- Morell, C., "Saying No: Women's Experiences with Reproductive Refusal", pp. 313-322 in *Feminism & Psychology*, SAGE Publications, vol. 10, (3), 2000.
- Mullally, S., "Gendered Citizenship: Debating Reproductive Rights in Ireland", pp. 78-104 in *Human Rights Quarterly*, 27.1., The Johns Hopkins University Press, 2005.
- Mullally, S., "The UN, Minority Rights and Gendered Equality: Setting Limits to Collective Claims", pp. 263-283 in *International Journal on Minority and Group Rights*, vol. 14, Martinus Nijhoff Publishers, 2007.
- Packer, C., "Defining and Delineating the Right to Reproductive Choice", pp. 77-95 in *Nordic Journal of International Law*, vol. 67, no. 1, Martinus Nijhoff Publishers, 1998.
- Rasmussen, N., "The Frontiers of Gender: Introduction", pp. 187-191 in Hastrup, K. and Ulrich, G. (eds.), *Discrimination and Toleration, New Perspectives, International Studies in Human Rights*, Martinus Nijhoff Publishers, The Hague, 2002.
- Scales, A.C., "The Emergency of Feminist Jurisprudence: An Essay", pp. 40-57 in Weisberg, D.K., (ed.), *Feminist Legal Theory, Foundations*, Temple University Press, Philadelphia, 1993.
- Sharpe, J.L., "Article 50", in L.E. Pettiti, E. Decaux, P.-H. Imbert (eds.), *La Convention européenne des droits de l'homme: Commentaire article par article*, Paris, Economica, 1995.
- Schokkenbroek, J., The Basis, "Nature and Application of the Margin-of-Appreciation Doctrine in the Case-law of the European Court of Human Rights", pp. 30-36 in *Human Rights Law Journal*, vol. 19, no. 1, April, 1998.

- Sustaein, Cass R., "Gender, Caste, and Law", pp. 333-359 in *Women, Culture and Development. A Study of Human Capabilities*. Edited by Nussbaum, Martha C., and Glover, Jonathan. Clarendon Press, Oxford, 1995.
- Tachuk, A., "Midwifery, Informed Choice, and Reproductive Autonomy: A Relational Approach", pp. 39-56, in *Feminism & Psychology*, SAGE Publications, vol. 17, 2007.
- van Eerdewijk, A., "How Sexual and Reproductive Rights Can Divide and Unite", pp. 421-439 in *European Journal of Women's Studies*, SAGE Publications, vol. 8 (4), 2001.
- Walsh, B., "The European Court of Human Rights", p. 273 in *Connecticut Journal of International Law*, vol. 2, Spring 1987.

INTERNET SOURCES

- Abortion Review at www.abortionreview.org. (consulted on 24 April 2008).
- Abortion Rights. The National Pro-choice Campaign. www.abortionrights.org.uk. (consulted on 17 May 2008).
- Annual statistics on the cases of the ECHR.
<http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+information+by+year/>. (consulted on 12 May 2008).
- Articles in Helsingin Sanomat: Every Minute a Woman Dies because of Pregnancy or Delivery and The New EU Countries are Slowing Down the Improvements of the Women's Sexual Health at www.hs.fi. (consulted on 21 April 2008) Translation my own.
- British Pregnancy Advisory Service at www.futureofabortion.org. (consulted on 5 June 2008)
- Columbia Electronic Encyclopedia at www.reference.com. (consulted on 14 May 2008).
- Crisis Pregnancy Agency. Formulating & Implementing a National Strategy in Ireland at www.crisispregnancy.ie. (consulted on 23 April 2008).
- Dean, John W., *What is Judicial Activism? The Charges Made against the President's Judicial Nominees* at www.writ.news.findlaw.com. (consulted on 6 May 2008).
- Internet Modern History Sourcebook at <http://www.fordham.edu/halsall/mod/Senecafalls.html>. (consulted 10 April 2008).
- Navarane, Vaiju, Frontline, Vol. 21, Issue 6, March, 2004. Available at www.hinduonnet.com. (consulted on 5 June 2008).
- The Directive 2004/38/EC on the right of the EU citizens and their family members to move and reside freely within the territory of the Member States at www.europa.eu. (consulted on 10 June 2008).

The Rights of Women, Men and Children with Respect to Artificial Insemination at www.fubini.swartmore.edu. (consulted on 17 May 2008).

The World's Abortion Laws in 2007 by the Center for Reproductive Rights. More information available at www.reproductiverights.org. (consulted on 30 May 2008).

The World Health Organisation at www.who.int. (consulted on 11 July 2008)

Women and Men in Ireland, 2007 at www.finfacts.com. (consulted on 5 June 2008).

LEGAL DOCUMENTS

Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol no. 11), adopted in Rome on 4 November 1950 (date of entry into force 1 November 1998).

Charter of the Fundamental Rights of the European Union, (2000/C 364/01). Available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf. (consulted on 29 April 2008).

Additional 12 Protocol on Antidiscrimination (date of entry into force 1 April 2005) available at the Council of Europe's Treaty Office at www.conventions.coe.int. (consulted on 11 July 2008).

Report on the Access to Safe and Legal Abortion in Europe by the Committee on Equal Opportunities for Women and Men, Parliamentary Assembly, Council of Europe. Rapporteur: Ms. Gisela Wurm, Austria, Socialist Group. Available at <http://assembly.coe.int/Documents/WorkingDocs/Doc08/EDOC11537.pdf>. (consulted on 12 May 2008).

CASES BEFORE THE EUROPEAN COURT²²⁸

Case Abdulaziz, Cabales and Balkandali v. the United Kingdom, no. 9214/80, no. 9473/81, no. 9474/81, on 28 May 1985, Series A no. 94.

Case Bensaid v. the United Kingdom, no. 44599/98, on 6 February 2001.

Case Blečić v. Croatia no. 59532/00 on 29 July 2004.

Case D. v. Ireland no. 26499/02, on 27 June 2006.

Case Dudgeon v. the United Kingdom, Series A no. 45, on 22 October 1981.

Case E. B. v. France no. 43546/02, on 22 January 2008.

Case Evans v. The United Kingdom no. 6339/05, on 10 April 2007.

²²⁸ Cases of the European Court of Human Rights can be found at the Internet address: www.echr.coe.int

Case Fretté v. France no. 36515/97, on 26 February 2002.

Case Gillow v. the United Kingdom no. 9063/80, on 24 November 1986, A109.

Case H v. Norway no. 17004/90, on 19 May 1992.

Case Handyside v. the United Kingdom no. 5493/72, on 4 November 1976, A24.

Case Hatton and Others v. the United Kingdom no. 5856/72, on 25 April 1978, A 26.

Case Johnston and Others v. Ireland, Series A no. 112, on 18 December 1986.

Case Kjeldsen, Busk Madsen and Pedersen v. Denmark no. 5095/71; 5920/72; 5926/72, on 5 November 1976, A23.

Case Marckx v. Belgium no. 6833/74, on 13 June 1979, A31.

Case Niemietz v. Germany, Series A, no. 251-B, on 16 December 1992.

Case of Open Door and Dublin Well Woman v. Ireland, Series A, no. 246-A, on 29 October 1992.

Case Pretty v. the United Kingdom, no.2346/02, on 29 April 2002.

Case Rees v. the United Kingdom no. 9532/81, on 17 October 1986.

Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v. Belgium no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, on 23 July 1968, A6.

Case Salgueiro da Silva Mouta v. Portugal no. 33290/96, on 12 December 1999.

Case Selmouni v. France no. 25803/94, on 28 July 1999.

Case Thlimmenos v. Greece no. 34369/97, on 6 April 2000.

Case Tysiąc v. Poland no. 5410/03, on 20 March 2007.

Case Vo v. France no. 53924/00, on 8 July 2004.

Case X v. Norway no. 867/60, on 29 May 1961, 6 CD 34.

Case X v. the United Kingdom no. 8416/79, on 13 May 1980.

Case Young, James and Webster v. the United Kingdom no. 7601/76; 7806/77 on 13 August 1981, A44.

European Commission of HR, Case X. v. the United Kingdom no. DR 19, on 13 May 1980.